114TH CONGRESS
2d Session
HOUSE OF REPRESENTATIVES
REPT. 114–512
Part 1

STRENGTHENING ACCESS TO VALUABLE EDUCATION AND RETIREMENT SUPPORT ACT OF 2015

APRIL 20, 2016.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. BRADY of Texas, from the Committee on Ways and Means, submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 4294]

[Including cost estimate of the Congressional Budget Office]

The Committee on Ways and Means, to whom was referred the bill (H.R. 4294) to amend the Internal Revenue Code of 1986 to ensure that retirement investors receive advice in their best interests, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

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59–006

The amendment is as follows:
Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Strengthening Access to Valuable Education and Retirement Support Act of 2015" or the "SAVERS Act of 2015".

SEC. 2. PURPOSE.

The purpose of this Act is to provide that advisors who—

(1) provide advice that is impermissible under the prohibited transaction provisions under section 4975 of the Internal Revenue Code of 1986, or

(2) breach the best interest standard for the provision of investment advice, are subject to liability under the Internal Revenue Code of 1986.

SEC. 3. RULES RELATING TO THE PROVISION OF INVESTMENT ADVICE.

(a) AMENDMENTS TO THE INTERNAL REVENUE CODE OF 1986.—

(1) EXEMPTION FOR INVESTMENT ADVICE WHICH IS BEST INTEREST RECOMMENDATION.—Section 4975(d) of the Internal Revenue Code of 1986 is amended by striking "or" at the end of paragraph (22), by striking the period at the end of paragraph (23) and inserting ", or", and by inserting after paragraph (23) the following:

"(24) provision of investment advice by a fiduciary to a plan, plan participant, or beneficiary with respect to the plan, which is a best interest recommendation or a transaction connected to such advice.".

(2) INVESTMENT ADVICE; BEST INTEREST RECOMMENDATION.—Section 4975(e) of such Code is amended by adding at the end the following:

"(10) INVESTMENT ADVICE.—

"(A) IN GENERAL.—For purposes of this section, the term 'investment advice' means a recommendation that—

"(i) relates to—

"(I) the advisability of acquiring, holding, disposing, or exchanging any moneys or other property of a plan by the plan, plan participants, or plan beneficiaries, including any recommendation whether to take a distribution of benefits from such plan or any recommendation relating to the investment of any moneys or other property of such plan to be distributed from such plan;

"(II) the management of moneys or other property of such plan, including recommendations relating to the management of moneys or other property to be distributed from such plan; or

"(III) the advisability of retaining or ceasing to retain a person who would receive a fee or other compensation for providing any of the types of advice described in this subclause; and

"(ii) is rendered pursuant to—

"(I) a written acknowledgment that the person is a fiduciary with respect to the provision of such recommendation; or

"(II) a mutual agreement, arrangement, or understanding which may include limitations on scope, timing, and responsibility to provide ongoing monitoring or advice services, between the person making such recommendation and the plan, plan participant, or beneficiary that such recommendation is individualized to the plan, plan participant, or beneficiary and such plan, plan participant, or beneficiary intends to materially rely on such recommendation in making investment or management decisions with respect to any moneys or other property of such plan.

"(B) DISCLAIMER OF A MUTUAL AGREEMENT, ARRANGEMENT, OR UNDERSTANDING.—For purposes of subparagraph (A)(ii)(II), any disclaimer of a

mutual agreement, arrangement, or understanding shall only state the following: 'This information is not individualized to you, and you are not intended to materially rely on this information in making investment or management decisions.'. Such disclaimer shall not be effective unless such disclaimer is in writing and is communicated in a clear and prominent manner and an objective person would reasonably conclude that, based on all the facts and circumstances, there was not a mutual agreement, arrangement, or understanding.

"(C) WHEN RECOMMENDATION TREATED AS MADE PURSUANT TO A MUTUAL AGREEMENT, ARRANGEMENT, OR UNDERSTANDING.—For purposes of subparagraph (A)(ii)(II), information shall not be treated as a recommendation made pursuant to a mutual agreement, arrangement, or understanding, and such information shall contain the disclaimer required by subparagraph (B), if—

"(i) SELLER'S EXCEPTION.—The information is provided in conjunction with full and fair disclosure in writing to a plan, plan participant, or beneficiary that the person providing the information is doing so in its marketing or sales capacity, including any information regarding the terms and conditions of the engagement of the person providing the information, and that the person is not intending to provide investment advice within the meaning of this subparagraph or to otherwise act as a fiduciary to the plan or under the obligations of a best interest recommendation.

"(ii) SWAP AND SECURITY-BASED SWAP TRANSACTION.—The person providing the information is a counterparty or service provider to the plan in connection with any transaction based on the information (including a service arrangement, sale, purchase, loan, bilateral contract, swap (as defined in section 1a of the Commodity Exchange Act (7 U.S.C. 1a)), or security-based swap (as defined in section 3(a) of the Securities Exchange Act (15 U.S.C. 78c(a)))), but only if—

"(I) the plan is represented, in connection with such transaction, by a plan fiduciary that is independent of the person providing the information, and, except in the case of a swap or security-based swap, independent of the plan sponsor; and

"(II) prior to entering into such transaction, the independent plan fiduciary represents in writing to the person providing the information that it is aware that the person has a financial interest in the transaction and that it has determined that the person is not intending to provide investment advice within the meaning of this subparagraph or to otherwise act as a fiduciary to the plan, plan participants, or plan beneficiaries.

"(iii) EMPLOYEES OF A PLAN SPONSOR.—The person providing the information is an employee of any sponsoring employer or employee organization who provides the information to the plan for no fee or other compensation other than the employee's normal compensation.

"(iv) PLATFORM PROVIDERS SELECTION AND MONITORING ASSISTANCE.—The person providing the information discloses in writing to the plan fiduciary that the person is not undertaking to provide investment advice as a fiduciary (within the meaning of this paragraph) or under the obligations of a best interest recommendation and the information consists solely of—

"(I) making available to the plan, plan participants, or plan beneficiaries, without regard to the individualized needs of the plan, plan participants, or plan beneficiaries, securities or other property through a platform or similar mechanism from which a plan fiduciary may select or monitor investment alternatives, including qualified default investment alternatives, into which plan participants or beneficiaries may direct the investment of assets held in, or contributed to, their individual accounts, or

"(II) in connection with a platform or similar mechanism described in subclause (I)—

"(aa) identifying investment alternatives that meet objective criteria specified by the plan, such as criteria concerning expense ratios, fund sizes, types of asset, or credit quality, or

"(bb) providing objective financial data and comparisons with independent benchmarks to the plan.

"(v) VALUATION.—The information consists solely of valuation information.

"(vi) FINANCIAL EDUCATION.—The information consists solely of—

"(I) information described in Department of Labor Interpretive Bulletin 96–1 (29 C.F.R. 2509.96–1, as in effect on January 1, 2015), regardless of whether such education is provided to a plan or plan fiduciary or a participant or beneficiary,

"(II) information provided to participants or beneficiaries regarding the factors to consider in deciding whether to elect to receive a distribution from a plan and whether to roll over such distribution to a plan, so long as any examples of different distribution alternatives are accompanied by all material facts and assumptions on which the examples are based, or

"(III) any additional information treated as education by the Secretary.

"(11) BEST INTEREST RECOMMENDATION.—For purposes of this subsection—

"(A) IN GENERAL.—The term 'best interest recommendation' means a recommendation—

"(i) for which no more than reasonable compensation is paid (as determined under subsection (d)(2)),

"(ii) provided by a person acting with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person would exercise based on—

"(I) the information obtained through the reasonable diligence of the person regarding factors such as the advice recipient's age, and

"(II) any other information that the advice recipient discloses to the person in connection with receiving such recommendation, and

"(iii) where the person places the interests of the plan or advice recipient above its own.

"(B) INVESTMENT OPTIONS; VARIABLE COMPENSATION.—A best interest recommendation may include a recommendation that—

"(i) is based on a limited range of investment options (which may consist, in whole or in part, of proprietary products), but only if any such limitations shall be clearly disclosed to the advice recipient prior to any transaction based on the investment advice in the form of a notice that only states the following: 'This recommendation is based on a limited range of investment options, and the same or similar investments may be available at a different cost (greater or lesser) from other sources.', or

"(ii) may result in variable compensation to the person providing the recommendation (or any affiliate of such person), but only if the receipt of such compensation shall be clearly disclosed to the advice recipient prior to any transaction based on the investment advice.

"(C) CLEAR DISCLOSURE OF VARIABLE COMPENSATION.—For purposes of this paragraph, clear disclosure of variable compensation shall include, in a manner calculated to be understood by the average individual, each of the following:

"(i) A notice that states only the following: 'This recommendation may result in varying amounts of fees or other compensation to the person providing the recommendation (or its affiliate), and the same or similar investments may be available at a different cost (greater or lesser) from other sources.'. Any regulations or administrative guidance implementing this clause may not require this notice to be updated more than annually.

"(ii) A description of any fee or other compensation that is directly or indirectly payable to the person (or its affiliate) by the advice recipient with respect to such transaction (expressed as an amount, formula, percentage of assets, per capita charge, or estimate or range of such compensation).

"(iii) A description of the types and ranges of any compensation that may be directly or indirectly payable to the person (or its affiliate) by any third party in connection with such transaction (expressed as an amount, formula, percentage of assets, per capita charge, or estimate or range of such compensation).

"(iv) Upon request of the advice recipient, a disclosure of the specific amounts of compensation described in clause (iii) that the person will receive in connection with the particular transaction (expressed as an amount, formula, percentage of assets, per capita charge, or estimate of such compensation).

"(D) DEFINITION OF AFFILIATE.—For purposes of this paragraph, the term 'affiliate' has the meaning given in subsection (f)(8)(J)(ii).

"(E) CORRECTION OF CERTAIN ERRORS AND OMISSIONS.—A recommendation shall not fail to be a best interest recommendation solely because a person who, acting in good faith and with reasonable diligence, makes an error or omission in disclosing the information specified in subparagraph (B), if the person discloses the correct information to the advice recipient as soon as practicable but not later than 30 days from the date on which the person knows of such error or omission.

"(F) SPECIAL RULE.—Any notice provided pursuant to a requirement under subparagraph (B)(i) or subparagraph (C)(i) shall have no effect on any other notice otherwise required without regard to this title, and shall be provided in addition to, and not in lieu of, any other such notice.".

(3) FAILURES RELATING TO BEST INTEREST RECOMMENDATION.—

(A) CORRECTION.—Section 4975(f)(5) of such Code is amended—

(i) by striking "(5) CORRECTION.—The terms" and inserting:

"(5) CORRECTION.—

"(A) IN GENERAL.—Except as provided in subparagraph (B), the terms", and

(ii) by adding at the end the following:

"(B) DETERMINATION OF 'CORRECTION' AND 'CORRECT' WITH RESPECT TO BEST INTEREST ADVICE RECOMMENDATIONS.—In the case of a prohibited transaction arising by the failure of investment advice to be a best interest recommendation, the terms 'correction' and 'correct' mean the payment to, or reimbursement of, actual damages of the plan, plan participants, or plan beneficiaries resulting directly from the plan's, plan participant's, or plan beneficiary's reliance on such investment advice, if any, that have not otherwise been paid or reimbursed to the plan, plan participants, or plan beneficiaries, including payments and reimbursements made pursuant to subparagraph (A) if such amount is greater than the amount determined under subparagraph (A).".

(B) AMOUNT INVOLVED FOR PURPOSES OF EXCISE TAX.—The first sentence of section 4975(f)(4) of such Code is amended by striking "excess compensation." and inserting "excess compensation, and in the case of a prohibited transaction arising by the failure of investment advice to be a best interest recommendation, the amount involved shall be the amount paid to the person providing the advice (or its affiliate, as defined in paragraph (8)(J)(ii)) that has not been paid or reimbursed to the plan, plan participants, or plan beneficiaries, including payments and reimbursements made pursuant to paragraph (5).".

(b) EFFECTIVE DATE.—

(1) MODIFICATION OF CERTAIN RULES, AND RULES AND ADMINISTRATIVE POSITIONS PROMULGATED BEFORE ENACTMENT BUT NOT EFFECTIVE ON JANUARY 1, 2015, PROHIBITED.—The Department of Labor is prohibited from amending any rules or administrative positions promulgated under section 3(21) of the Employee Retirement Security Act of 1974 and section 4975(e)(3) of the Internal Revenue Code of 1986 (including Department of Labor Interpretive Bulletin 96–1 (29 C.F.R. 2509.96–1) and Department of Labor Advisory Opinion 2005–23A), and no such rule or administrative position promulgated by the Department of Labor prior to the date of the enactment of this Act but not effective on January 1, 2015, may become effective unless a bill or joint resolution referred to in paragraph (3) is enacted as described in such paragraph not later than 60 days after the date of the enactment of this Act.

(2) GENERAL EFFECTIVE DATE OF AMENDMENTS.—Except as provided in paragraph (3), the amendments made by subsection (a) of this section shall take effect on the 61st day after the date of the enactment of this Act and shall apply with respect to information provided or recommendations made on or after 2 years after the date of the enactment of this Act.

(3) EXCEPTION.—If a bill or joint resolution is enacted prior to the 61st day after the date of the enactment of this Act that specifically approves any rules or administrative positions promulgated under section 3(21) of the Employee Retirement Income Security Act of 1974 and section 4975(e)(3) of the Internal Revenue Code of 1986 that is not in effect on January 1, 2015, the amendments made by subsection (a) of this section shall not take effect.

(c) GRANDFATHERED TRANSACTIONS AND SERVICES.—The amendments made by subsection (a) shall not apply to any service or transaction rendered, entered into, or for which a person has been compensated prior to the date on which the amendments made by subsection (a) of this Act become effective under subsection (b)(2).

(d) TRANSITION.—If the amendments made by subsection (a) of this section take effect, then nothing in this section shall be construed to prohibit the issuance of guidance to carry out such amendments so long as such guidance is necessary to

implement such amendments. Until such time as regulations or other guidance is issued to carry out such amendments, a plan or a fiduciary shall be treated as meeting the requirements of such amendments if the plan or fiduciary, as the case may be, complies with a reasonable good faith interpretation of such amendments.

I. SUMMARY AND BACKGROUND

A. Purpose and Summary

The bill, H.R. 4294, as reported by the Committee on Ways and Means, amends the prohibited transaction rules applicable to tax-favored savings arrangements to require those providing investment advice to act in the best interests of their clients by providing a definition of investment advice that results in fiduciary status and to provide a prohibited transaction exemption for advice that is a best interest recommendation (within the meaning of the bill). Thus, under the bill, a fiduciary that provides advice that is impermissible or that breaches the best interest standard is subject to liability under the Internal Revenue Code of 1986.

B. Background and Need for Legislation

Private-sector employer-sponsored retirement plans and individual retirement arrangements (IRAs) are valuable tools used by millions of Americans to help save for retirement. The existing regulations defining when those rendering investment advice are treated as fiduciaries were issued in 1975. At that time, about 45 million Americans participated in private-sector employer-sponsored plans (33 million in defined benefit plans; 12 million in defined contribution plans), the assets of which were generally managed by investment professionals. In 2013, about 130 million Americans participated in private-sector employer-sponsored plans (39 million in defined benefit plans; 92 million in defined contribution plans), with total assets of about $8.1 trillion ($3.1 trillion in defined benefit plans; $5 trillion in defined contribution plans). Defined contribution plan participants commonly direct the investment of their accounts. Since the creation of IRAs in 1974, the total number of Americans with IRAs has grown to about 57 million as of 2013, and the total value of assets held in IRAs in 2013 was about $7 trillion. In light of the changes and growth that have occurred in the retirement savings area, the 1975 regulations are now outdated.

The Committee believes that those providing investment advice to retirement plans and participants (and also other tax-favored savings arrangements) should generally be treated as fiduciaries and required to act in the best interests of plans and plan participants and beneficiaries. The Committee, therefore, believes that the current law definition regarding when those providing such investment advice are treated as fiduciaries should be expanded. At the same time, the Committee also believes that plans and plan participants should have access to retirement services and products. This is particularly the case for small businesses sponsoring retirement plans and low- and middle-income Americans.

C. LEGISLATIVE HISTORY

Background

H.R. 4294 was introduced on December 18, 2015, and was referred to the Committee on Ways and Means, and to the Committee on Education and the Workforce.

Committee action

The Committee on Ways and Means marked up H.R. 4294, the "Strengthening Access to Valuable Education and Retirement Support Act of 2015" or the "SAVERS Act of 2015," on February 3, 2016, and ordered the bill, as amended, favorably reported (with a quorum being present).

Committee hearings

On September 30, 2015, the Subcommittee on Oversight of the Committee on Ways and Means held a public hearing on the Department of Labor's proposed rule dealing with the provision of investment advice that results in fiduciary status and proposed prohibited transaction exemptions.

On October 1, 2009, the Committee on Ways and Means held a public hearing on the importance of Americans saving for retirement having access to investment advice.

II. EXPLANATION OF THE BILL

A. RULES RELATING TO THE PROVISION OF INVESTMENT ADVICE (SECS. 2–3 OF THE BILL AND SEC. 4975 OF THE CODE)

PRESENT LAW

Tax-favored savings arrangements

Tax-favored retirement savings

The Internal Revenue Code of 1986 ("Code")[1] provides two general vehicles for tax-favored retirement savings: employer-sponsored retirement plans and individual IRAs.[2] Various requirements must be met for tax-favored treatment to apply. Retirement plans of private employers also are generally subject to the Employee Retirement Income Security Act of 1974 ("ERISA"), over which the Department of Labor ("DOL") has jurisdiction.[3]

The most common type of tax-favored employer-sponsored plan is a qualified retirement plan, which may be a defined contribution plan or a defined benefit plan.[4] Under a defined contribution plan, benefits are based on a separate account for each participant, to which are allocated contributions, earnings and losses.[5] Defined contribution plans commonly allow participants to direct the investment of their accounts, usually by choosing among investment options offered under the plan. Under a defined benefit plan, bene-

[1] All section references herein are to the Code unless otherwise indicated.
[2] Sections 219, 408 and 408A provide rules for IRAs.
[3] ERISA generally does not apply to church plans or plans of governmental employers.
[4] Sec. 401(a). A qualified annuity plan under section 403(a) is similar to a qualified retirement plan (and subject to similar requirements) except that plan assets consist of annuity contracts, rather than investments held in a trust or custodial account. References herein to a qualified retirement plan include a qualified annuity plan.
[5] Defined contribution plan is defined at section 414(i).

fits are determined under a plan formula, and benefits under a defined benefit plan are funded by the general assets of the trust established under the plan, which are invested by plan fiduciaries; individual accounts are not maintained for employees participating in the plan.[6]

A "section 401(k) plan" is a qualified defined contribution plan that includes a feature (a "qualified cash or deferred arrangement") under which an employee may elect to have contributions (elective deferrals) made to the plan, rather than receive the same amount in cash.[7] A "section 403(b) plan" is generally similar to a section 401(k) plan, but may be maintained only by a tax-exempt charitable organization or a public school.[8]

Some employer-sponsored plans are funded through contributions by the employer to an IRA established for each employee. Specifically, an employer may maintain a simplified employee pension ("SEP") plan and certain small employers may maintain a SIMPLE IRA plan.[9]

A distribution from an employer-sponsored retirement plan or IRA is includible in income except to the extent it consists of a return of basis or an excludible distribution from a Roth arrangement.[10] In most cases, however, a distribution may be rolled over on a nontaxable basis to another such plan or an IRA, either by a direct rollover or by contributing the distribution to the other plan or IRA within 60 days of receiving the distribution.[11]

Health savings accounts and Archer MSAs

An individual with a high deductible health plan (and, subject to exceptions, no other health plan) generally may make contributions to a health savings account ("HSA").[12] In some cases, such an individual may contribute to an Archer MSA (that is, medical savings account).[13] Subject to limits, an individual's HSA and Archer MSA contributions are deductible in determining adjusted gross income and are excludable from an employee's income and wages if made by an employer. HSA and Archer MSA distributions used for qualified medical expenses are not includible in gross income. Distributions may also be rolled over to another HSA or Archer MSA.

Coverdell education savings accounts

A Coverdell education savings account ("Coverdell ESA") is an account created exclusively for the purpose of paying qualified education expenses of a designated beneficiary.[14] Subject to income limits, annual after-tax contributions up to $2,000 may be made until a designated beneficiary reaches age 18. Earnings on contributions to a Coverdell ESA generally are includible in income when withdrawn; however, distributions are excludable from in-

[6] As defined in section 414(j), a defined benefit plan is any plan that is not a defined contribution plan.
[7] Section 401(k) provides rules for qualified cash or deferred arrangements.
[8] Section 403(b) provides rules for these plans. Another type of tax-favored employer-sponsored plan is a State or local government eligible deferred compensation plan under section 457(b), which is similar to a qualified cash or deferred arrangement under section 401(k).
[9] Sec. 408(k) and (p).
[10] Sections 402A and 408A provide rules for Roth arrangements.
[11] Secs. 402(c), 403(a)(4), 403(b)(8), 408(d)(3), 408A(e) and 457(e)(16).
[12] Section 223 provides rules for HSAs.
[13] Section 220 provides rules for Archer MSAs.
[14] Section 530 provides rules for Coverdell ESAs.

come up to the beneficiary's qualified education expenses for the year. Amounts in a Coverdell ESA may be rolled over to another Coverdell ESA for the same beneficiary or certain family members. In general, the balance in a Coverdell ESA is deemed distributed within 30 days after the date that the beneficiary reaches age 30.

Prohibited transaction rules

In general

The Code prohibits certain transactions ("prohibited transaction") between a qualified retirement plan and a disqualified person.[15] The prohibited transaction rules under the Code apply also to IRAs, Archer MSAs, HSAs, and Coverdell ESAs.[16]

Prohibited transactions include the following transactions, whether direct or indirect, between a plan and a disqualified person: (1) the sale or exchange or leasing of property, (2) the lending of money or other extension of credit, (3) the furnishing of goods, services or facilities, (4) the transfer to, or use by or for the benefit of, the income or assets of the plan, (5) in the case of a fiduciary, an act dealing with the plan's income or assets in the fiduciary's own interest or for the fiduciary's own account, and (6) the receipt by a fiduciary of any consideration for the fiduciary's own personal account from any party dealing with the plan in connection with a transaction involving the income or assets of the plan.[17]

A disqualified person is a fiduciary of the plan, a person providing services to the plan, an employer with employees covered by the plan, an employee organization or an employee organization any of whose members are covered by the plan, and also includes certain owners, officers, directors, highly compensated employees, family members, and related entities.[18] A fiduciary means any person who (1) exercises any discretionary authority or discretionary control respecting management of the plan or exercises any authority or control respecting management or disposition of the plan's assets, (2) renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of the plan, or has any authority or responsibility to do so, or (3) has any discretionary authority or discretionary responsibility in the administration of the plan.[19]

Certain transactions are statutorily exempt from prohibited transaction treatment, for example, certain loans to plan participants and arrangements with a disqualified person for legal, accounting or other services necessary for the establishment or operation of a plan if no more than reasonable compensation is paid for the services.[20] In addition, an administrative exemption may be granted, on either an individual or class basis, subject to a finding

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[15] Sec. 4975. The prohibited transaction rules under the Code generally do not apply to governmental plans or church plans. However, under section 503, the trust holding assets of a governmental or church plan may lose its tax-exempt status in the case of a prohibited transaction listed in section 503(b). The prohibited transaction rules under the Code also do not apply to section 403(b) plans. However, the prohibited transaction rules under ERISA may apply to a section 403(b) plan unless it is a governmental plan or church plan exempt from ERISA or is described in 29 C.F.R. section 2510.3–2(f).

[16] These are included in the definition of "plan" under section 4975(e)(1).

[17] Sec. 4975(c)(1).

[18] Sec. 4975(e)(2).

[19] Sec. 4975(e)(3). Fiduciary also includes any named fiduciary under ERISA section 405(c)(1)(B).

[20] Sec. 4975(d)(1) and (d)(2).

that the exemption is administratively feasible, in the interests of the plan and of its participants and beneficiaries, and protective of the rights of participants and beneficiaries of the plan.[21] Before an administrative exemption is granted, notice must be provided to interested persons, notice must be published in the Federal Register of the pendency of the exemption, and interested persons must be given an opportunity to provide comments.

Excise tax on prohibited transactions [22]

If a prohibited transaction occurs, the disqualified person who participated in the transaction is generally subject to a two-tiered excise tax.[23] The first tier tax is 15 percent of the amount involved in the transaction. The second tier tax, imposed if the prohibited transaction is not corrected within a certain period, is 100 percent of the amount involved.

For purposes of the excise tax, the amount involved with respect to a prohibited transaction is generally the greater of (1) the amount of money and the fair market value of the other property given or (2) the amount of money and the fair market value of the other property received.[24] For purposes of the excise tax, "correction" and "correct" mean, with respect to a prohibited transaction, undoing the transaction to the extent possible, but in any case placing the plan in a financial position not worse than that in which it would be if the disqualified person were acting under the highest fiduciary standards.

Jurisdiction over the prohibited transaction rules

Jurisdiction over the Code provisions governing qualified retirement plans and similar ERISA provisions is divided between the Department of the Treasury ("Treasury") and DOL by Executive Order, referred to as Reorganization Plan No. 4 of 1978 ("Reorganization Plan").[25] As part of this division, with certain exceptions, Treasury authority was transferred to DOL with respect to regulations, rulings, opinions, and exemptions under the prohibited transaction provisions of the Code.[26] As a result, DOL regulations and other guidance relating to prohibited transactions apply for Code purposes, as well as for ERISA purposes, and DOL has the authority to grant individual and class exemptions applicable under the Code, including with respect to IRAs, HSAs, Archer MSAs, and Coverdell ESAs. However, DOL has no enforcement authority with respect to these accounts that are not covered under ERISA. Treas-

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[21] Sec. 4975(c)(2).

[22] Under ERISA sections 409 and 502(a)(2), in the case of a breach of fiduciary responsibility with respect to an employer-sponsored plan, including a prohibited transaction, a civil suit may be brought by DOL, a plan participant or beneficiary, or another fiduciary. However, a cause of action under ERISA is not available with respect to a plan not subject to ERISA, such as an IRA, HSA, Archer MSA, or Coverdell ESA. The Code does not provide a private cause of action in the case of a prohibited transaction, either with respect to an employer-sponsored plan or an IRA, HSA, Archer MSA, or Coverdell ESA.

[23] In the case of an IRA, HSA, Archer MSA or Coverdell ESA, the sanction for some prohibited transactions is the loss of tax-favored status, rather than an excise tax. See section 408(e)(2), also cross-referenced in sections 220(e)(2), 223(e)(2) and 530(e).

[24] In the case of certain transactions for services for which more than reasonable compensation is paid, the amount involved is only the excess compensation.

[25] 43 Fed. Reg. 47713, October 17, 1978.

[26] Secs. 102 and 105 of the Reorganization Plan. Rules for coordination concerning certain fiduciary actions are provided under section 103 of the Reorganization Plan. In addition, under section 3003 of ERISA, Treasury and DOL are directed to consult with each other from time to time with respect to the prohibited transaction rules and exemptions.

ury has exclusive enforcement authority with respect to these accounts.

Rules relating to investment advice

Fiduciary status

As described above, a fiduciary includes a person who renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of the plan, or has any authority or responsibility to do so.

Existing DOL regulations, issued in 1975, provide that a person is deemed to be rendering "investment advice" to an employee benefit plan for this purpose only if:

- the person renders advice to the plan as to the value of securities or other property, or makes recommendation as to the advisability of investing in, purchasing, or selling securities or other property; and
- the person either directly or indirectly (for example, through or together with any affiliate) (1) has discretionary authority or control, whether or not pursuant to agreement, arrangement or understanding, with respect to purchasing or selling securities or other property for the plan, or (2) renders any advice as described above on a regular basis to the plan pursuant to a mutual agreement, arrangement or understanding, written or otherwise, between the person and the plan or a fiduciary with respect to the plan, that the person's services will serve as a primary basis for investment decisions with respect to plan assets, and that the person will render individualized investment advice to the plan based on the particular needs of the plan regarding matters such as, among other things, investment policies or strategy, overall portfolio composition, or diversification of plan investments.[27]

The regulations further provide that a person who is a fiduciary with respect to a plan by reason of rendering investment advice (as described above) for a fee or other compensation, direct or indirect, with respect to any moneys or other property of the plan, or having any authority or responsibility to do so, is not deemed to be a fiduciary regarding any assets of the plan with respect to which the person does not have any discretionary authority, discretionary control or discretionary responsibility, does not exercise any authority or control, does not render investment advice (as described above) for a fee or other compensation, and does not have any authority or responsibility to render such investment advice. However, this rule does not exempt the person from ERISA liability attributable to a breach of responsibility by a co-fiduciary or exclude the person from the definition of the term party in interest[28] based on providing services to the plan with respect to any assets of the plan.

In addition to the regulations, other guidance issued by DOL, Interpretive Bulletin 96–1, provides that the furnishing of mere investment education to a participant or beneficiary in a participant-directed individual account plan does not constitute the rendering

[27] 29 C.F.R. sec. 2510.3–21(c).

[28] Party in interest is the term under ERISA that corresponds to disqualified person under the Code and it is defined in a similar manner.

of investment advice.[29] For this purpose, investment education includes the following categories of information and materials (described more fully in Interpretive Bulletin 96–1): plan information, general financial and investment information, asset allocation models, and interactive investment materials. Interpretive Bulletin 96–1 notes that the information and materials described in the four categories merely represent examples of the type of information and materials that may be furnished to participants and beneficiaries without such information and materials constituting investment advice, and there may be many other examples of information, materials, and educational services that, if furnished to participants and beneficiaries, would not constitute investment advice. Accordingly, Interpretive Bulletin 96–1 provides that no inferences should be drawn from the description of the four categories with respect to whether the furnishing of any information, materials or educational services not described therein may constitute investment advice.

Statutory exemptions relating to investment advice

If certain requirements are met, specific transactions relating to investment advice are exempt from prohibited transaction treatment if the advice is provided by a fiduciary advisor through an eligible investment advice arrangement.[30] The exemptions apply to (1) the provision of investment advice to a plan participant or beneficiary with respect to a security or other property available as an investment under the plan, (2) an investment transaction (that is, a sale, acquisition, or holding of a security or other property) pursuant to the advice, and (3) the direct or indirect receipt of fees or other compensation in connection with the provision of the advice or an investment transaction pursuant to the advice.

For purposes of the exemptions, an eligible investment advice arrangement is generally an arrangement that either (1) provides that any fees (including any commission or compensation) received by the fiduciary adviser for investment advice or with respect to an investment transaction with respect to plan assets do not vary depending on the basis of any investment option selected (sometimes referred to as "fee-leveling"), or (2) uses a computer model under an investment advice program that meets specified requirements in connection with the provision of investment advice to a participant or beneficiary.[31] The arrangement must be expressly authorized by a plan fiduciary other than (1) the person offering the investment advice program, (2) any person providing investment options under the plan, or (3) any affiliate of (1) or (2).[32] In addition, the fiduciary adviser must provide disclosures applicable under securities laws; any investment transaction must occur solely at the direction of the

[29] 29 C.F.R. sec. 2905.96–1. This treatment applies irrespective of who provides the information (for example, the plan sponsor, fiduciary or service provider), the frequency with which the information is shared, the form in which the information and materials are provided (for example, on an individual or group basis, in writing or orally, or via video or computer software), or whether an identified category of information and materials is furnished alone or in combination with other identified categories of information and materials.

[30] Sec. 4975(d)(17) and (f)(8). These exemptions and parallel exemptions under ERISA section 408(b)(14) and (g) were established by section 601 of the Pension Protection Act of 2006, Pub. L. No. 109–280.

[31] Various requirements with respect to notices and disclosure, recordkeeping and audits must also be met.

[32] Affiliate for this purpose means an affiliated person as defined under section 2(a)(3) of the Investment Company Act of 1940.

investment advice recipient; the compensation received by the fiduciary adviser and affiliates in connection with the investment transaction must be reasonable; and the terms of the investment transaction must be at least as favorable to the plan as an arm's length transaction would be.

DOL proposed regulations and "BIC" exemption

On April 20, 2015, DOL proposed regulations that would replace the current regulations relating to investment advice with a new standard as to whether a person is a fiduciary based on rendering investment advice, generally to be applicable eight months after final regulations are published.[33] Under the proposed regulations, a person is a fiduciary based on rendering investment advice if the person:

- provides to a plan, a plan fiduciary, an IRA,[34] or an IRA owner certain types of recommendations or statements (as described below) that constitute investment advice with respect to plan or IRA assets in exchange for a fee or other compensation, and
- either directly or indirectly (such as through an affiliate), (1) represents or acknowledges that it is acting as a fiduciary with respect to the investment advice, or (2) renders the advice pursuant to a written or verbal agreement, arrangement or understanding that the advice is individualized to, or that the advice is specifically directed to, the advice recipient for consideration in making investment or management decisions with respect to securities or other property of the plan or IRA.

Under the proposed regulations, investment advice includes:

- a recommendation as to the advisability of acquiring, holding, disposing of or exchanging securities or other property, including a recommendation to take a distribution of benefits or a recommendation as to the investment of securities or other property to be rolled over or otherwise distributed from the plan or IRA;[35]
- a recommendation as to the management of securities or other property, including recommendations as to the management of securities or other property to be rolled over or otherwise distributed from the plan or IRA;

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[33] Definition of the Term "Fiduciary"; Conflict of Interest Rule-Retirement Investment Advice, 80 Fed. Reg. 21928, April 20, 2015. The proposed regulations would apply for purposes of ERISA and the prohibited transaction rules of the Code.

[34] IRA is defined in the proposed guidance to include HSAs, Archer MSAs, and Coverdell ESAs, as well as IRAs. In Part IV.E of the preamble to the proposed regulations, DOL requests comments as to whether it is appropriate to cover individual accounts other than IRAs and treat them in a manner similar to IRAs. 80 Fed. Reg. at 21947.

[35] DOL Advisory Opinion 2005–23A (December 7, 2005) addresses the question of whether a recommendation that a participant in a pension plan roll over his or her account balance to an IRA to take advantage of investment options not available under the plan constitutes investment advice with respect to plan assets. The advisory opinion expresses the view that, with respect to a person who is not otherwise a plan fiduciary, merely advising a plan participant to take an otherwise permissible plan distribution, even when the advice is combined with a recommendation as to how the distribution should be invested, does not constitute investment advice within the meaning of the existing DOL investment advice regulations defining when a person is a fiduciary by virtue of providing investment advice with respect to employee benefit plan assets. The advisory opinion provides that DOL does not view a recommendation to take a distribution as advice or a recommendation concerning a particular investment (that is, purchasing or selling securities or other property) as contemplated by the regulations and that any investment recommendation regarding the proceeds of a distribution would be advice with respect to funds that are no longer plan assets. Part IV.A(1) of the preamble to the proposed regulations notes that the proposed regulations, if finalized, would supersede Advisory Opinion 2005–23A. 80 Fed. Reg. at 21939.

- an appraisal, fairness opinion, or similar statement, whether verbal or written, concerning the value of securities or other property if provided in connection with a specific transaction or transactions involving the acquisition, disposition, or exchange, of such securities or other property by the plan or IRA; and
- a recommendation of a person who is also going to receive a fee or other compensation for providing any of the types of advice described above.

Subject to specified requirements for each exception, the proposed regulations provide exceptions (referred to as "carve-outs") for (1) certain counterparties in transactions with an employee benefit plan (referred to as the "seller's carve-out"); (2) swap and security-based swap transactions with an employee benefit plan; (3) employees of an employee benefit plan sponsor; (4) platform providers to employee benefit plans; (5) persons providing selection and monitoring assistance to employee benefit plans; (6) financial reports and valuations (including to an IRA or IRA owner); and (7) investment education (including to an IRA or IRA owner), under standards somewhat different from the standards in the existing DOL guidance. However, an exception does not apply if the person represents or acknowledges that it is acting as a fiduciary with respect to the advice. In conjunction with the proposed regulations, DOL has proposed two new prohibited transaction class exemptions, including a "best interest contract" (or "BIC") exemption,[36] as well as proposing changes to various existing class exemptions.

The proposed BIC class exemption generally applies to compensation received by an investment adviser or related party in connection with a transaction (that is, a purchase, sale or holding of assets) resulting from investment advice provided to "retirement investors," meaning plan participants or beneficiaries who direct the investment of the assets in their accounts, IRA owners who make investment decisions with respect to their IRAs, and a plan sponsor (or employee, officer, or director thereof) of a plan with fewer than 100 participants where the plan does not provide for participant-directed investments and the plan sponsor acts as a fiduciary who has authority to make plan investment decisions. Under the proposed exemption, investment advice is in the best interest of a retirement investor when the adviser and financial institution providing the advice act with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person would exercise based on the investment objectives, risk tolerance, financial circumstances, and needs of the retirement investor, without regard to the financial or other interests of the adviser, financial institution or any affiliate, related entity, or other party.[37]

Assets subject to the proposed BIC class exemption include the following: bank deposits; certificates of deposit (CDs); shares or interests in mutual funds; bank collective funds; insurance company separate accounts; exchange-traded REITs (Real Estate Investment

[36] Proposed Best Interest Contract Exemption, 80 Fed. Reg. 21960, April 20, 2015. This class exemption is proposed to become applicable at the same time as the 2015 proposed fiduciary regulations, eight months after publication of final regulations.

[37] The preamble to the proposed exemption states, "Under this standard, the Adviser and Financial Institution must put the interests of the Retirement Investor ahead of the financial interests of the Adviser, Financial Institution or their Affiliates, Related Entities or any other party." 80 C.F.R. at 21970.

Trusts); exchange-traded funds; corporate bonds offered pursuant to a registration statement under the Securities Act of 1933; agency debt securities and U.S. Treasury securities; insurance and annuity contracts, guaranteed investment contracts, and exchange-traded equity securities. In order for the proposed exemption to apply, specific requirements must be met relating to the investment advice contract (described below), impartial conduct with respect to the advice, range of investment options, cost and fee disclosures to retirement investors, disclosures to DOL and record-keeping.

The proposed BIC class exemption requires that, before making any recommendations on investment transactions, the adviser and financial institution enter into a written contract with the retirement investor as follows:

- the contract affirmatively states that the adviser and financial institution are fiduciaries under the ERISA or the Code, or both, with respect to any investment recommendation to the retirement investor;
- under the contract, the adviser and financial institution specifically agree to adhere to certain impartial conduct standards, which include providing investment advice that is in the best interest of the retirement investor, not recommending investment in an asset if they (or affiliates) will receive more than reasonable compensation in relation to the total services they provide to the retirement investor with respect to the investment, and not providing any statements about an asset, fees, material conflict of interest, and any other matter related to the retirement investor's investment decision that are misleading;
- under the contract, the adviser and financial institution provide certain warranties and make certain disclosures related to fees and conflicts of interest; and
- the contract must not have exculpatory provisions disclaiming or otherwise limiting liability of the adviser or financial institution for a violation of the contract's terms, or a provision under which a plan, IRA, or retirement investor waives or qualifies its right to bring or participate in a class action or other representative action in court in a dispute with the adviser or financial institution.[38]

REASONS FOR CHANGE

Impartial investment advice plays an important role in helping workers to save for retirement. The Committee is concerned that existing regulations may not apply a fiduciary standard of care with respect to investment advice in all appropriate circumstances. On the other hand, proposed rules issued by the Department of Labor would restrict access to investment advice. For example, the Committee is concerned that the Department of Labor's proposed

[38] As described in DOL's background discussion of the proposed exemption, the contract terms to which advisors and financial institutions must agree in order to qualify for the proposed BIC class exemption potentially create a cause of action that may be used by retirement investors to enforce these contract terms. 80 Fed. Reg. at 21972-21973. For example, an IRA owner could have a contract claim if the adviser recommends an investment product that is not in the IRA owner's best interest, even though, as noted above, the Code does not create such a cause of action for an IRA owner. As noted above, a cause of action under ERISA also is not available with respect to a plan not subject to ERISA, such as an IRA.

rules, particularly the proposed best interest contract exemption, purport to effectively delegate to the plaintiffs trial bar the Department of Treasury's authority to enforce the fiduciary rules with respect to IRAs, by making the creation of a private right of action a prerequisite to providing investment advice. The Committee seeks to assure that fiduciary status applies when appropriate and to require fiduciaries that provide investment advice to act in the best interests of their clients, while not imposing administrative requirements so burdensome as to limit the availability of advice.

EXPLANATION OF PROVISION

In general

The provision specifies that its purpose is to provide that advisors who (1) provide advice that is impermissible under the prohibited transaction provisions of the Code, or (2) breach the best interest standard for the provision of investment advice, are subject to liability under the Code.

The provision adds a statutory definition of investment advice to the prohibited transaction rules under the Code.[39] In addition, subject to specified requirements, the provision adds a new statutory exemption for the provision of investment advice by a fiduciary to a plan, plan participant, or beneficiary with respect to the plan, referred to as a "best interest recommendation," or a transaction connected to the advice.

Definition of investment advice

General rule

A person providing investment advice, as defined under the provision, for a fee or other compensation, direct or indirect, with respect to any moneys or other property of the plan, or having any authority or responsibility to do so, is generally treated as a fiduciary with respect to the plan (and thus is a disqualified person with respect to the plan).

Specifically, under the provision, a recommendation that relates to any of the following may be investment advice (if rendered under the conditions described below):

- the advisability of acquiring, holding, disposing, or exchanging any moneys or other property of a plan by the plan, plan participants, or plan beneficiaries, including any recommendation whether to take a distribution of benefits from the plan or any recommendation relating to the investment of any moneys or other property of the plan to be distributed from the plan;
- the management of moneys or other property of the plan, including recommendations relating to the management of moneys or other property to be distributed from the plan; or
- the advisability of retaining or ceasing to retain a person who would receive a fee or other compensation for providing any of these types of advice.

A rollover is always done in connection with a distribution. Thus, recommendations relating to moneys or other property to be dis-

[39] The provision supersedes both existing DOL regulations and the proposed regulations and exemptions issued by DOL in April 2015, as described in Present Law.

tributed from a plan include recommendations relating to rollovers of such moneys or other property.

In order for a recommendation to be investment advice, it must be rendered pursuant to either of the following:

- a written acknowledgment that the person is a fiduciary with respect to the provision of the recommendation; or
- a mutual agreement, arrangement, or understanding, which may include limitations as to the scope, timing, and responsibility to provide ongoing monitoring or advice services, between the person making the recommendation and the plan, plan participant, or beneficiary that (1) the recommendation is individualized to the plan, plan participant, or beneficiary and (2) the plan, plan participant, or beneficiary intends to materially rely on the recommendation in making investment or management decisions with respect to any moneys or other property of the plan.

Disclaimer of a mutual agreement, arrangement, or understanding

Under the provision, any disclaimer of a mutual agreement, arrangement, or understanding with respect to a recommendation must only state the following: "This information is not individualized to you, and you are not intended to materially rely on this information in making investment or management decisions." Further, this disclaimer is not effective unless it is in writing and is communicated in a clear and prominent manner and an objective person would reasonably conclude that, based on all the facts and circumstances, there was not a mutual agreement, arrangement, or understanding.

Information not treated as investment advice

Under the provision, information provided in the circumstances described below is not treated as a recommendation made pursuant to a mutual agreement, arrangement, or understanding for purposes of the definition of investment advice. The information in these circumstances shall contain the disclaimer described above.

Seller's exception. The information is provided in conjunction with full and fair disclosure in writing to a plan, plan participant, or beneficiary that the person providing the information is doing so in its marketing or sales capacity, including any information regarding the terms and conditions of the engagement of the person providing the information, and that the person is not intending to provide investment advice (as defined under the provision) or to otherwise act as a fiduciary to the plan or to act under the obligations of a best interest recommendation (described below).

Swap and security-based swap transaction. The person providing the information is a counterparty or service provider to the plan in connection with any transaction based on the information (including a service arrangement, sale, purchase, loan, bilateral contract, swap,[40] or security-based swap[41]). In addition, the plan is represented, in connection with the transaction, by a plan fiduciary

[40] A swap for this purpose is defined in section 1a of the Commodity Exchange Act (7 U.S.C. sec. 1a).

[41] A security-based swap for this purpose is defined in section 3(a) of the Securities Exchange Act (15 U.S.C. sec. 78c(a)).

that is independent of the person providing the information, and, except in the case of a swap or security-based swap, independent of the plan sponsor. Further, prior to entering into the transaction, the independent plan fiduciary represents in writing to the person providing the information that it is aware that the person has a financial interest in the transaction and that it has determined that the person is not intending to provide investment advice (as defined under the provision) or to otherwise act as a fiduciary to the plan, plan participants, or plan beneficiaries.

Employees of a plan sponsor. The person providing the information is an employee of any sponsoring employer or employee organization who provides the information to the plan for no fee or other compensation other than the employee's normal compensation.

Platform providers selection and monitoring assistance. The person providing the information discloses in writing to the plan fiduciary that the person is not undertaking to provide investment advice as a fiduciary or under the obligations of a best interest recommendation. In addition, the information provided consists solely of either of the following:

- making available to the plan, plan participants, or plan beneficiaries, without regard to the individualized needs of the plan, plan participants, or plan beneficiaries, securities or other property through a platform or similar mechanism from which a plan fiduciary may select or monitor investment alternatives, including qualified default investment alternatives, into which plan participants or beneficiaries may direct the investment of assets held in, or contributed to, their individual accounts; or
- in connection with a platform or similar mechanism described above, either (1) identifying investment alternatives that meet objective criteria specified by the plan, such as criteria concerning expense ratios, fund sizes, types of asset, or credit quality, or (2) providing objective financial data and comparisons with independent benchmarks to the plan.

Valuation. The information consists solely of valuation information.

Financial education. The information consists solely of the following:

- information described in DOL Interpretive Bulletin 96–1 as in effect on January 1, 2015, regardless of whether the education is provided to a plan or plan fiduciary or a participant or beneficiary;
- information provided to participants or beneficiaries regarding the factors to consider in deciding whether to elect to receive a distribution from a plan and whether to roll over the distribution to a plan, so long as any examples of different distribution alternatives are accompanied by all material facts and assumptions on which the examples are based; or
- any additional information treated as education by the Secretary of the Treasury.[42]

[42] However, under the Reorganization Plan, discussed above, the Secretary of Labor is granted interpretive authority over this provision.

Best interest recommendation exemption

The provision includes a prohibited transaction exemption for the provision of investment advice by a fiduciary to a plan, plan participant, or beneficiary with respect to the plan, or a transaction connected to the advice, in the case of a "best interest recommendation."

As defined under the provision, a best interest recommendation is a recommendation:

- for which no more than reasonable compensation is paid;[43]
- provided by a person (referred to herein as the "adviser") acting with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person would exercise based on the information obtained through the adviser's reasonable diligence regarding factors such as the advice recipient's age and any other information that the advice recipient discloses to the adviser in connection with receiving the recommendation; and
- where the adviser places the interests of the plan or advice recipient above its own.

A best interest recommendation may include a recommendation that is based on a limited range of investment options, which may consist, in whole or in part, of proprietary products, but only if any limitations are clearly disclosed to the advice recipient before any transaction based on the investment advice in the form of a notice that states only the following: "This recommendation is based on a limited range of investment options, and the same or similar investments may be available at a different cost (greater or lesser) from other sources."

A best interest recommendation may also include a recommendation that may result in variable compensation to the adviser (or any affiliate[44] of the adviser), but only if the receipt of the compensation is clearly disclosed to the advice recipient before any transaction based on the investment advice. For this purpose, clear disclosure of variable compensation must include, in a manner calculated to be understood by the average individual, each of the following:

(1) a notice that states only the following: "This recommendation may result in varying amounts of fees or other compensation to the person providing the recommendation (or its affiliate), and the same or similar investments may be available at a different cost (greater or lesser) from other sources."[45]

(2) A description of any fee or other compensation that is directly or indirectly payable to the adviser (or its affiliate) by the advice recipient with respect to the transaction (expressed

[43] Reasonable compensation for this purpose is determined as under the present-law prohibited transaction exemption for an arrangement with a disqualified person for services necessary for the establishment or operation of a plan if no more than reasonable compensation is paid therefor. Sec. 4975(d)(2).

[44] Under the provision, affiliate is defined as under the present-law exemption relating to investment advice, that is, an affiliated person as defined under section 2(a)(3) of the Investment Company Act of 1940.

[45] Any regulations or other administrative guidance implementing this requirement may not require this notice to be updated more frequently than annually with respect to a particular recommendation that constitutes investment advice, regardless of whether multiple transactions are based on the advice. However, a new notice would be required with respect to any new recommendation that constitutes investment advice.

as an amount, formula, percentage of assets, per capita charge, or estimate or range of the compensation).

(3) A description of the types and ranges of any compensation that may be directly or indirectly payable to the adviser (or its affiliate) by any third party in connection with the transaction (expressed as an amount, formula, percentage of assets, per capita charge, or estimate or range of the compensation).

(4) On request of the advice recipient, a disclosure of the specific amounts of compensation described in (3) that the adviser will receive in connection with the particular transaction (expressed as an amount, formula, percentage of assets, per capita charge, or estimate of the compensation).

A notice with respect to limitations on the range of investment options on which a recommendation is based or with respect to variable compensation shall have no effect on any other notice otherwise required without regard to the Code and shall be provided in addition to, and not in lieu of, any other such notice.

Under the provision, a recommendation will not fail to be a best interest recommendation solely because a person who, acting in good faith and with reasonable diligence, makes an error or omission in disclosing the information specified above if the person discloses the correct information to the advice recipient as soon as practicable, but not later than 30 days from the date on which the person knows of the error or omission.

The provision includes special rules relating to the amount involved and correction with respect to a prohibited transaction arising by the failure of investment advice to be a best interest recommendation. In that case, the amount involved is the amount paid to the person providing the advice (or its affiliate) that has not been paid or reimbursed to the plan, plan participants, or plan beneficiaries, including payments and reimbursements made pursuant to a correction (as described in the following sentence). In addition, "correction" and "correct" in this case mean the payment to, or reimbursement of, actual damages of the plan, plan participants, or plan beneficiaries resulting directly from the plan's, plan participant's, or plan beneficiary's reliance on the investment advice, if any, that have not otherwise been paid or reimbursed to the plan, plan participants, or plan beneficiaries, including payments and reimbursements made pursuant to the general correction rule under present law (that is, undoing the transaction to the extent possible, but in any case placing the plan in a financial position not worse than that in which it would be if the disqualified person were acting under the highest fiduciary standards) if such amount is greater than the amount determined under the present-law correction rule.

EFFECTIVE DATE

The amendments made by the provision generally are effective on the 61st day after the date of enactment of the provision and apply with respect to information provided or recommendations made on or after two years after the date of enactment. However, if, before the 61st day after the date of enactment, a bill or joint resolution is enacted that specifically approves any rules or administrative positions that are promulgated under the Code and

ERISA statutory definitions of fiduciary [46] and are not in effect on January 1, 2015, the amendments made by the provision will not take effect. In addition, the amendments made by the provision do not apply to any service or transaction rendered, entered into, or for which a person has been compensated before the date on which the amendments generally become effective.

DOL is prohibited from amending any rules or administrative positions promulgated under the Code and ERISA statutory definitions of fiduciary (including DOL Interpretive Bulletin 96–1 and Advisory Opinion 2005–23A, discussed in Present Law), and no rule or administrative position promulgated by DOL before the date of enactment of the provision but not effective on January 1, 2015, may become effective unless a bill or joint resolution as described above is enacted not later than 60 days after the date of enactment of the provision. If the amendments made by the provision take effect, nothing in the provision is to be construed to prohibit the issuance of guidance to carry out the amendments so long as the guidance is necessary to implement the amendments. Until the time when regulations or other guidance is issued to carry out the amendments, a plan or a fiduciary will be treated as meeting the requirements of the amendments if the plan or fiduciary, as applicable, complies with a reasonable good faith interpretation of the amendments.

III. VOTES OF THE COMMITTEE

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the following statement is made concerning the vote of the Committee on Ways and Means in its consideration of H.R. 4294, the "Strengthening Access to Valuable Education and Retirement Support Act of 2015" or the "SAVERS Act of 2015," on February 3, 2016.

The Chairman's amendment in the nature of a substitute was adopted by a voice vote (with a quorum being present).

The bill, H.R. 4294, was ordered favorably reported to the House of Representatives as amended by a roll call vote of 26 yeas to 12 nays (with a quorum being present). The vote was as follows:

Representative	Yea	Nay	Present	Representative	Yea	Nay	Present
Mr. Brady	X			Mr. Levin		X	
Mr. Johnson	X			Mr. Rangel		X	
Mr. Nunes	X			Mr. McDermott		X	
Mr. Tiberi	X			Mr. Lewis		X	
Mr. Reichert	X			Mr. Neal	X		
Mr. Boustany				Mr. Becerra		X	
Mr. Roskam	X			Mr. Doggett		X	
Mr. Price	X			Mr. Thompson	X		
Mr. Buchanan	X			Mr. Larson	X		
Mr. Smith (NE)	X			Mr. Blumenauer		X	
Ms. Jenkins	X			Mr. Kind		X	
Mr. Paulsen	X			Mr. Pascrell		X	
Mr. Marchant	X			Mr. Crowley		X	
Ms. Black	X			Mr. Davis		X	
Mr. Reed	X			Ms. Sanchez		X	
Mr. Young	X						
Mr. Kelly	X						
Mr. Renacci	X						
Mr. Meehan	X						

[46] Sec. 4975(e)(3) and ERISA sec. 3(21).

Representative	Yea	Nay	Present	Representative	Yea	Nay	Present
Ms. Noem	X						
Mr. Holding	X						
Mr. Smith (MO)	X						
Mr. Dold	X						
Mr. Rice	X						

IV. BUDGET EFFECTS OF THE BILL

A. Committee Estimate of Budgetary Effects

In compliance with clause 3(d) of rule XIII of the Rules of the House of Representatives, the following statement is made concerning the effects on the budget of the bill, H.R. 4294, as reported.

The bill, as reported, is estimated to have a negligible effect on Federal fiscal year budget receipts for the period 2016–2026.

Pursuant to clause 8 of rule XIII of the Rules of the House of Representatives, the following statement is made by the Joint Committee on Taxation with respect to the provisions of the bill amending the Internal Revenue Code of 1986: The gross budgetary effect (before incorporating macroeconomic effects) in any fiscal year is less than 0.25 percent of the current projected gross domestic product of the United States for that fiscal year; therefore, the bill is not "major legislation" for purposes of requiring that the estimate include the budgetary effects of changes in economic output, employment, capital stock and other macroeconomic variables.

B. Statement Regarding New Budget Authority and Tax Expenditures Budget Authority

In compliance with clause 3(c)(2) of rule XIII of the Rules of the House of Representatives, the Committee states that the bill involves no new or increased budget authority. The Committee further states that there are no new or increased tax expenditures.

C. Cost Estimate Prepared by the Congressional Budget Office

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, requiring a cost estimate prepared by the CBO, the following statement by CBO is provided.

U.S. Congress,
Congressional Budget Office,
Washington, DC, February 10, 2016.

Hon. Kevin Brady,
Chairman, Committee on Ways and Means,
House of Representatives, Washington, DC.

Dear Mr. Chairman: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 4294, the Strengthening Access to Valuable Education and Retirement Support Act of 2015.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Peter Huether.

Sincerely,

Keith Hall.

Enclosure.

H.R. 4294—Strengthening Access to Valuable Education and Retirement Support Act of 2015

H.R. 4294, the Strengthening Access to Valuable Education and Retirement Support Act of 2015, amends the section of the Internal Revenue Code that prohibits self-dealing transactions by fiduciaries of certain tax-favored plans, including employer-sponsored retirement plans, individual retirement accounts and health savings accounts. The bill would add a definition of investment advice to that section of the Internal Revenue Code. The bill would also add a new statutory exemption related to investment advice that a fiduciary can provide to these tax-favored plans, plan participants, or beneficiaries. Among other provisions, H.R. 4294 would change requirements regarding disclosure of potential compensation accruing to the fiduciary or an affiliate.

The staff of the Joint Committee on Taxation (JCT) estimates that the bill would have a negligible effect on revenues for the period between 2016 and 2026. Enacting the bill would not affect direct spending. Because enacting H.R. 4294 would affect revenues, pay-as-you-go procedures apply.

CBO and JCT estimate that enacting H.R. 4294 would not increase net direct spending or on-budget deficits by more than $5 billion in any of the four consecutive 10-year periods beginning in 2027.

JCT has determined that the bill contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act.

The CBO staff contact for this estimate is Peter Huether. The estimate was approved by David Weiner, Assistant Director for Tax Analysis.

V. OTHER MATTERS TO BE DISCUSSED UNDER THE RULES OF THE HOUSE

A. Committee Oversight Findings and Recommendations

With respect to clause 3(c)(1) of rule XIII of the Rules of the House of Representatives (relating to oversight findings), the Committee advises that it was as a result of the Committee's review of the provisions of H.R. 4294 that the Committee concluded that it is appropriate to report the bill, as amended, favorably to the House of Representatives with the recommendation that the bill do pass.

B. Statement of General Performance Goals and Objectives

With respect to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the Committee advises that the bill contains no measure that authorizes funding, so no statement of general performance goals and objectives for which any measure authorizes funding is required.

C. Information Relating to Unfunded Mandates

This information is provided in accordance with section 423 of the Unfunded Mandates Reform Act of 1995 (Pub. L. No. 104–4).

The Committee has determined that the bill does not contain Federal mandates on the private sector. The Committee has deter-

mined that the bill does not impose a Federal intergovernmental mandate on State, local, or tribal governments.

D. Applicability of House Rule XXI 5(b)

Rule XXI 5(b) of the Rules of the House of Representatives provides, in part, that "A bill or joint resolution, amendment, or conference report carrying a Federal income tax rate increase may not be considered as passed or agreed to unless so determined by a vote of not less than three-fifths of the Members voting, a quorum being present." The Committee has carefully reviewed the bill, and states that the bill does not involve any Federal income tax rate increases within the meaning of the rule.

E. Tax Complexity Analysis

Section 4022(b) of the Internal Revenue Service Restructuring and Reform Act of 1998 ("IRS Reform Act") requires the staff of the Joint Committee on Taxation (in consultation with the Internal Revenue Service and the Treasury Department) to provide a tax complexity analysis. The complexity analysis is required for all legislation reported by the Senate Committee on Finance, the House Committee on Ways and Means, or any committee of conference if the legislation includes a provision that directly or indirectly amends the Internal Revenue Code of 1986 and has widespread applicability to individuals or small businesses.

Pursuant to clause 3(h)(1) of rule XIII of the Rules of the House of Representatives, the staff of the Joint Committee on Taxation has determined that a complexity analysis is not required under section 4022(b) of the IRS Reform Act because the bill contains no provisions that amend the Internal Revenue Code of 1986 and that have "widespread applicability" to individuals or small businesses, within the meaning of the rule.

F. Congressional Earmarks, Limited Tax Benefits, and Limited Tariff Benefits

With respect to clause 9 of rule XXI of the Rules of the House of Representatives, the Committee has carefully reviewed the provisions of the bill and states that the provisions of the bill do not contain any congressional earmarks, limited tax benefits, or limited tariff benefits within the meaning of the rule.

G. Duplication of Federal Programs

In compliance with Sec. 3(g)(2) of H. Res. 5 (114th Congress), the Committee states that no provision of the bill establishes or reauthorizes: (1) a program of the Federal Government known to be duplicative of another Federal program, (2) a program included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139, or (3) a program related to a program identified in the most recent Catalog of Federal Domestic Assistance, published pursuant to the Federal Program Information Act (Public Law 95–220, as amended by Public Law 98–169).

H. DISCLOSURE OF DIRECTED RULE MAKINGS

In compliance with Sec. 3(i) of H. Res. 5 (114th Congress), the following statement is made concerning directed rule makings: The Committee estimates that the bill requires no directed rule makings within the meaning of such section.

VI. CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

A. TEXT OF EXISTING LAW AMENDED OR REPEALED BY THE BILL, AS REPORTED

In compliance with clause 3(e)(1)(A) of rule XIII of the Rules of the House of Representatives, the text of each section proposed to be amended or repealed by the bill, as reported, is shown below:

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e)(1)(A) of rule XIII of the Rules of the House of Representatives, the text of each section proposed to be amended or repealed by the bill, as reported, is shown below:

INTERNAL REVENUE CODE OF 1986

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Subtitle D—Miscellaneous Excise Taxes

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CHAPTER 43—QUALIFIED PENSION, ETC., PLANS

* * * * * * *

SEC. 4975. TAX ON PROHIBITED TRANSACTIONS.

(a) INITIAL TAXES ON DISQUALIFIED PERSON.—There is hereby imposed a tax on each prohibited transaction. The rate of tax shall be equal to 15 percent of the amount involved with respect to the prohibited transaction for each year (or part thereof) in the taxable period. The tax imposed by this subsection shall be paid by any disqualified person who participates in the prohibited transaction (other than a fiduciary acting only as such).

(b) ADDITIONAL TAXES ON DISQUALIFIED PERSON.—In any case in which an initial tax is imposed by subsection (a) on a prohibited transaction and the transaction is not corrected within the taxable period, there is hereby imposed a tax equal to 100 percent of the amount involved. The tax imposed by this subsection shall be paid by any disqualified person who participated in the prohibited transaction (other than a fiduciary acting only as such).

(c) PROHIBITED TRANSACTION.—

(1) GENERAL RULE.—For purposes of this section, the term "prohibited transaction" means any direct or indirect—

(A) sale or exchange, or leasing, of any property between a plan and a disqualified person;

(B) lending of money or other extension of credit between a plan and a disqualified person;

(C) furnishing of goods, services, or facilities between a plan and a disqualified person;

(D) transfer to, or use by or for the benefit of, a disqualified person of the income or assets of a plan;

(E) act by a disqualified person who is a fiduciary whereby he deals with the income or assets of a plan in his own interests or for his own account; or

(F) receipt of any consideration for his own personal account by any disqualified person who is a fiduciary from any party dealing with the plan in connection with a transaction involving the income or assets of the plan.

(2) SPECIAL EXEMPTION.—The Secretary shall establish an exemption procedure for purposes of this subsection. Pursuant to such procedure, he may grant a conditional or unconditional exemption of any disqualified person or transaction, orders of disqualified persons or transactions, from all or part of the restrictions imposed by paragraph (1) of this subsection. Action under this subparagraph may be taken only after consultation and coordination with the Secretary of Labor. The Secretary may not grant an exemption under this paragraph unless he finds that such exemption is—

(A) administratively feasible,

(B) in the interests of the plan and of its participants and beneficiaries, and

(C) protective of the rights of participants and beneficiaries of the plan.

Before granting an exemption under this paragraph, the Secretary shall require adequate notice to be given to interested persons and shall publish notice in the Federal Register of the pendency of such exemption and shall afford interested persons an opportunity to present views. No exemption may be granted under this paragraph with respect to a transaction described in subparagraph (E) or (F) of paragraph (1) unless the Secretary affords an opportunity for a hearing and makes a determination on the record with respect to the findings required under subparagraphs (A), (B), and (C) of this paragraph, except that in lieu of such hearing the Secretary may accept any record made by the Secretary of Labor with respect to an application for exemption under section 408(a) of title I of the Employee Retirement Income Security Act of 1974.

(3) SPECIAL RULE FOR INDIVIDUAL RETIREMENT ACCOUNTS.—An individual for whose benefit an individual retirement account is established and his beneficiaries shall be exempt from the tax imposed by this section with respect to any transaction concerning such account (which would otherwise be taxable under this section) if, with respect to such transaction, the account ceases to be an individual retirement account by reason of the application of section 408(e)(2)(A) or if section 408(e)(4) applies to such account.

(4) SPECIAL RULE FOR ARCHER MSAS.—An individual for whose benefit an Archer MSA (within the meaning of section 220(d)) is established shall be exempt from the tax imposed by this section with respect to any transaction concerning such ac-

count (which would otherwise be taxable under this section) if section 220(e)(2) applies to such transaction.

(5) SPECIAL RULE FOR COVERDELL EDUCATION SAVINGS ACCOUNTS.—An individual for whose benefit a Coverdell education savings account is established and any contributor to such account shall be exempt from the tax imposed by this section with respect to any transaction concerning such account (which would otherwise be taxable under this section) if section 530(d) applies with respect to such transaction.

(6) SPECIAL RULE FOR HEALTH SAVINGS ACCOUNTS.—An individual for whose benefit a health savings account (within the meaning of section 223(d)) is established shall be exempt from the tax imposed by this section with respect to any transaction concerning such account (which would otherwise be taxable under this section) if, with respect to such transaction, the account ceases to be a health savings account by reason of the application of section 223(e)(2) to such account.

(d) EXEMPTIONS.—Except as provided in subsection (f)(6), the prohibitions provided in subsection (c) shall not apply to—

(1) any loan made by the plan to a disqualified person who is a participant or beneficiary of the plan if such loan—

(A) is available to all such participants or beneficiaries on a reasonably equivalent basis,

(B) is not made available to highly compensated employees (within the meaning of section 414(q)) in an amount greater than the amount made available to other employees,

(C) is made in accordance with specific provisions regarding such loans set forth in the plan,

(D) bears a reasonable rate of interest, and

(E) is adequately secured;

(2) any contract, or reasonable arrangement, made with a disqualified person for office space, or legal, accounting, or other services necessary for the establishment or operation of the plan, if no more than reasonable compensation is paid therefor;

(3) any loan to an leveraged employee stock ownership plan (as defined in subsection (e)(7)), if—

(A) such loan is primarily for the benefit of participants and beneficiaries of the plan, and

(B) such loan is at a reasonable rate of interest, and any collateral which is given to a disqualified person by the plan consists only of qualifying employer securities (as defined in subsection (e)(8));

(4) the investment of all or part of a plan's assets in deposits which bear a reasonable interest rate in a bank or similar financial institution supervised by the United States or a State, if such bank or other institution is a fiduciary of such plan and if—

(A) the plan covers only employees of such bank or other institution and employees of affiliates of such bank or other institution, or

(B) such investment is expressly authorized by a provision of the plan or by a fiduciary (other than such bank or institution or affiliates thereof) who is expressly empow-

ered by the plan to so instruct the trustee with respect to such investment;

(5) any contract for life insurance, health insurance, or annuities with one or more insurers which are qualified to do business in a State if the plan pays no more than adequate consideration, and if each such insurer or insurers is—

(A) the employer maintaining the plan, or

(B) a disqualified person which is wholly owned (directly or indirectly) by the employer establishing the plan, or by any person which is a disqualified person with respect to the plan, but only if the total premiums and annuity considerations written by such insurers for life insurance, health insurance, or annuities for all plans (and their employers) with respect to which such insurers are disqualified persons (not including premiums or annuity considerations written by the employer maintaining the plan) do not exceed 5 percent of the total premiums and annuity considerations written for all lines of insurance in that year by such insurers (not including premiums or annuity considerations written by the employer maintaining the plan);

(6) the provision of any ancillary service by a bank or similar financial institution supervised by the United States or a State, if such service is provided at not more than reasonable compensation, if such bank or other institution is a fiduciary of such plan, and if—

(A) such bank or similar financial institution has adopted adequate internal safeguards which assure that the provision of such ancillary service is consistent with sound banking and financial practice, as determined by Federal or State supervisory authority, and

(B) the extent to which such ancillary service is provided is subject to specific guidelines issued by such bank or similar financial institution (as determined by the Secretary after consultation with Federal and State supervisory authority), and under such guidelines the bank or similar financial institution does not provide such ancillary service—

(i) in an excessive or unreasonable manner, and

(ii) in a manner that would be inconsistent with the best interests of participants and beneficiaries of employee benefit plans;

(7) the exercise of a privilege to convert securities, to the extent provided in regulations of the Secretary but only if the plan receives no less than adequate consideration pursuant to such conversion;

(8) any transaction between a plan and a common or collective trust fund or pooled investment fund maintained by a disqualified person which is a bank or trust company supervised by a State or Federal agency or between a plan and a pooled investment fund of an insurance company qualified to do business in a State if—

(A) the transaction is a sale or purchase of an interest in the fund,

(B) the bank, trust company, or insurance company receives not more than a reasonable compensation, and

(C) such transaction is expressly permitted by the instrument under which the plan is maintained, or by a fiduciary (other than the bank, trust company, or insurance company, or an affiliate thereof) who has authority to manage and control the assets of the plan;

(9) receipt by a disqualified person of any benefit to which he may be entitled as a participant or beneficiary in the plan, so long as the benefit is computed and paid on a basis which is consistent with the terms of the plan as applied to all other participants and beneficiaries;

(10) receipt by a disqualified person of any reasonable compensation for services rendered, or for the reimbursement of expenses properly and actually incurred, in the performance of his duties with the plan, but no person so serving who already receives full-time pay from an employer or an association of employers, whose employees are participants in the plan or from an employee organization whose members are participants in such plan shall receive compensation from such fund, except for reimbursement of expenses properly and actually incurred;

(11) service by a disqualified person as a fiduciary in addition to being an officer, employee, agent, or other representative of a disqualified person;

(12) the making by a fiduciary of a distribution of the assets of the trust in accordance with the terms of the plan if such assets are distributed in the same manner as provided under section 4044 of title IV of the Employee Retirement Income Security Act of 1974 (relating to allocation of assets);

(13) any transaction which is exempt from section 406 of such Act by reason of section 408(e) of such Act (or which would be so exempt if such section 406 applied to such transaction) or which is exempt from section 406 of such Act by reason of section 408(b)(12) of such Act;

(14) any transaction required or permitted under part 1 of subtitle E of title IV or section 4223 of the Employee Retirement Income Security Act of 1974, but this paragraph shall not apply with respect to the application of subsection (c)(1) (E) or (F);

(15) a merger of multiemployer plans, or the transfer of assets or liabilities between multiemployer plans, determined by the Pension Benefit Guaranty Corporation to meet the requirements of section 4231 of such Act, but this paragraph shall not apply with respect to the application of subsection (c)(1) (E) or (F);

(16) a sale of stock held by a trust which constitutes an individual retirement account under section 408(a) to the individual for whose benefit such account is established if—

(A) such stock is in a bank (as defined in section 581) or a depository institution holding company (as defined in section 3(w)(1) of the Federal Deposit Insurance Act (12 U.S.C. 1813(w)(1)),

(B) such stock is held by such trust as of the date of the enactment of this paragraph,

(C) such sale is pursuant to an election under section 1362(a) by such bank or company,

(D) such sale is for fair market value at the time of sale (as established by an independent appraiser) and the terms of the sale are otherwise at least as favorable to such trust as the terms that would apply on a sale to an unrelated party,

(E) such trust does not pay any commissions, costs, or other expenses in connection with the sale, and

(F) the stock is sold in a single transaction for cash not later than 120 days after the S corporation election is made;

(17) Any transaction in connection with the provision of investment advice described in subsection (e)(3)(B) to a participant or beneficiary in a plan that permits such participant or beneficiary to direct the investment of plan assets in an individual account, if—

(A) the transaction is—

(i) the provision of the investment advice to the participant or beneficiary of the plan with respect to a security or other property available as an investment under the plan,

(ii) the acquisition, holding, or sale of a security or other property available as an investment under the plan pursuant to the investment advice, or

(iii) the direct or indirect receipt of fees or other compensation by the fiduciary adviser or an affiliate thereof (or any employee, agent, or registered representative of the fiduciary adviser or affiliate) in connection with the provision of the advice or in connection with an acquisition, holding, or sale of a security or other property available as an investment under the plan pursuant to the investment advice; and

(B) the requirements of subsection (f)(8) are met,

(18) any transaction involving the purchase or sale of securities, or other property (as determined by the Secretary of Labor), between a plan and a disqualified person (other than a fiduciary described in subsection (e)(3)) with respect to a plan if—

(A) the transaction involves a block trade,

(B) at the time of the transaction, the interest of the plan (together with the interests of any other plans maintained by the same plan sponsor), does not exceed 10 percent of the aggregate size of the block trade,

(C) the terms of the transaction, including the price, are at least as favorable to the plan as an arm's length transaction, and

(D) the compensation associated with the purchase and sale is not greater than the compensation associated with an arm's length transaction with an unrelated party,

(19) any transaction involving the purchase or sale of securities, or other property (as determined by the Secretary of Labor), between a plan and a disqualified person if—

(A) the transaction is executed through an electronic communication network, alternative trading system, or

similar execution system or trading venue subject to regulation and oversight by—

(i) the applicable Federal regulating entity, or

(ii) such foreign regulatory entity as the Secretary of Labor may determine by regulation,

(B) either—

(i) the transaction is effected pursuant to rules designed to match purchases and sales at the best price available through the execution system in accordance with applicable rules of the Securities and Exchange Commission or other relevant governmental authority, or

(ii) neither the execution system nor the parties to the transaction take into account the identity of the parties in the execution of trades,

(C) the price and compensation associated with the purchase and sale are not greater than the price and compensation associated with an arm's length transaction with an unrelated party,

(D) if the disqualified person has an ownership interest in the system or venue described in subparagraph (A), the system or venue has been authorized by the plan sponsor or other independent fiduciary for transactions described in this paragraph, and

(E) not less than 30 days prior to the initial transaction described in this paragraph executed through any system or venue described in subparagraph (A), a plan fiduciary is provided written or electronic notice of the execution of such transaction through such system or venue,

(20) transactions described in subparagraphs (A), (B), and (D) of subsection (c)(1) between a plan and a person that is a disqualified person other than a fiduciary (or an affiliate) who has or exercises any discretionary authority or control with respect to the investment of the plan assets involved in the transaction or renders investment advice (within the meaning of subsection (e)(3)(B)) with respect to those assets, solely by reason of providing services to the plan or solely by reason of a relationship to such a service provider described in subparagraph (F), (G), (H), or (I) of subsection (e)(2), or both, but only if in connection with such transaction the plan receives no less, nor pays no more, than adequate consideration,

(21) any foreign exchange transactions, between a bank or broker-dealer (or any affiliate of either) and a plan (as defined in this section) with respect to which such bank or broker-dealer (or affiliate) is a trustee, custodian, fiduciary, or other disqualified person person, if—

(A) the transaction is in connection with the purchase, holding, or sale of securities or other investment assets (other than a foreign exchange transaction unrelated to any other investment in securities or other investment assets),

(B) at the time the foreign exchange transaction is entered into, the terms of the transaction are not less favorable to the plan than the terms generally available in comparable arm's length foreign exchange transactions be-

tween unrelated parties, or the terms afforded by the bank or broker-dealer (or any affiliate of either) in comparable arm's-length foreign exchange transactions involving unrelated parties,

(C) the exchange rate used by such bank or broker-dealer (or affiliate) for a particular foreign exchange transaction does not deviate by more than 3 percent from the interbank bid and asked rates for transactions of comparable size and maturity at the time of the transaction as displayed on an independent service that reports rates of exchange in the foreign currency market for such currency, and

(D) the bank or broker-dealer (or any affiliate of either) does not have investment discretion, or provide investment advice, with respect to the transaction,

(22) any transaction described in subsection (c)(1)(A) involving the purchase and sale of a security between a plan and any other account managed by the same investment manager, if—

(A) the transaction is a purchase or sale, for no consideration other than cash payment against prompt delivery of a security for which market quotations are readily available,

(B) the transaction is effected at the independent current market price of the security (within the meaning of section 270.17a-7(b) of title 17, Code of Federal Regulations),

(C) no brokerage commission, fee (except for customary transfer fees, the fact of which is disclosed pursuant to subparagraph (D)), or other remuneration is paid in connection with the transaction,

(D) a fiduciary (other than the investment manager engaging in the cross-trades or any affiliate) for each plan participating in the transaction authorizes in advance of any cross-trades (in a document that is separate from any other written agreement of the parties) the investment manager to engage in cross trades at the investment manager's discretion, after such fiduciary has received disclosure regarding the conditions under which cross trades may take place (but only if such disclosure is separate from any other agreement or disclosure involving the asset management relationship), including the written policies and procedures of the investment manager described in subparagraph (H),

(E) each plan participating in the transaction has assets of at least $100,000,000, except that if the assets of a plan are invested in a master trust containing the assets of plans maintained by employers in the same controlled group (as defined in section 407(d)(7) of the Employee Retirement Income Security Act of 1974), the master trust has assets of at least $100,000,000,

(F) the investment manager provides to the plan fiduciary who authorized cross trading under subparagraph (D) a quarterly report detailing all cross trades executed by the investment manager in which the plan participated during such quarter, including the following information, as applicable: (i) the identity of each security bought or

sold; (ii) the number of shares or units traded; (iii) the parties involved in the cross-trade; and (iv) trade price and the method used to establish the trade price,

(G) the investment manager does not base its fee schedule on the plan's consent to cross trading, and no other service (other than the investment opportunities and cost savings available through a cross trade) is conditioned on the plan's consent to cross trading,

(H) the investment manager has adopted, and cross-trades are effected in accordance with, written cross-trading policies and procedures that are fair and equitable to all accounts participating in the cross-trading program, and that include a description of the manager's pricing policies and procedures, and the manager's policies and procedures for allocating cross trades in an objective manner among accounts participating in the cross-trading program, and

(I) the investment manager has designated an individual responsible for periodically reviewing such purchases and sales to ensure compliance with the written policies and procedures described in subparagraph (H), and following such review, the individual shall issue an annual written report no later than 90 days following the period to which it relates signed under penalty of perjury to the plan fiduciary who authorized cross trading under subparagraph (D) describing the steps performed during the course of the review, the level of compliance, and any specific instances of non-compliance.

The written report shall also notify the plan fiduciary of the plan's right to terminate participation in the investment manager's cross-trading program at any time, or

(23) except as provided in subsection (f)(11), a transaction described in subparagraph (A), (B), (C), or (D) of subsection (c)(1) in connection with the acquisition, holding, or disposition of any security or commodity, if the transaction is corrected before the end of the correction period.

(e) DEFINITIONS.—

(1) PLAN.—For purposes of this section, the term "plan" means—

(A) a trust described in section 401(a) which forms a part of a plan, or a plan described in section 403(a), which trust or plan is exempt from tax under section 501(a),

(B) an individual retirement account described in section 408(a),

(C) an individual retirement annuity described in section 408(b),

(D) an Archer MSA described in section 220(d),

(E) a health savings account described in section 223(d),

(F) a Coverdell education savings account described in section 530, or

(G) a trust, plan, account, or annuity which, at any time, has been determined by the Secretary to be described in any preceding subparagraph of this paragraph.

(2) DISQUALIFIED PERSON.—For purposes of this section, the term "disqualified person" means a person who is—

(A) a fiduciary;

(B) a person providing services to the plan;

(C) an employer any of whose employees are covered by the plan;

(D) an employee organization any of whose members are covered by the plan;

(E) an owner, direct or indirect, of 50 percent or more of—

(i) the combined voting power of all classes of stock entitled to vote or the total value of shares of all classes of stock of a corporation,

(ii) the capital interest or the profits interest of a partnership, or

(iii) the beneficial interest of a trust or unincorporated enterprise,

which is an employer or an employee organization described in subparagraph (C) or (D);

(F) a member of the family (as defined in paragraph (6)) of any individual described in subparagraph (A), (B), (C), or (E);

(G) a corporation, partnership, or trust or estate of which (or in which) 50 percent or more of—

(i) the combined voting power of all classes of stock entitled to vote or the total value of shares of all classes of stock of such corporation,

(ii) the capital interest or profits interest of such partnership, or

(iii) the beneficial interest of such trust or estate, is owned directly or indirectly, or held by persons described in subparagraph (A), (B), (C), (D), or (E);

(H) an officer, director (or an individual having powers or responsibilities similar to those of officers or directors), a 10 percent or more shareholder, or a highly compensated employee (earning 10 percent or more of the yearly wages of an employer) of a person described in subparagraph (C), (D), (E), or (G); or

(I) a 10 percent or more (in capital or profits) partner or joint venturer of a person described in subparagraph (C), (D), (E), or (G).

The Secretary, after consultation and coordination with the Secretary of Labor or his delegate, may by regulation prescribe a percentage lower than 50 percent for subparagraphs (E) and (G) and lower than 10 percent for subparagraphs (H) and (I).

(3) FIDUCIARY.—For purposes of this section, the term "fiduciary" means any person who—

(A) exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets,

(B) renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or

(C) has any discretionary authority or discretionary responsibility in the administration of such plan.

Such term includes any person designated under section 405(c)(1)(B) of the Employee Retirement Income Security Act of 1974.

(4) STOCKHOLDINGS.—For purposes of paragraphs (2)(E)(i) and (G)(i) there shall be taken into account indirect stockholdings which would be taken into account under section 267(c), except that, for purposes of this paragraph, section 267(c)(4) shall be treated as providing that the members of the family of an individual are the members within the meaning of paragraph (6).

(5) PARTNERSHIPS; TRUSTS.—For purposes of paragraphs (2)(E)(ii) and (iii), (G)(ii) and (iii), and (I) the ownership of profits or beneficial interests shall be determined in accordance with the rules for constructive ownership of stock provided in section 267(c) (other than paragraph (3) thereof), except that section 267(c)(4) shall be treated as providing that the members of the family of an individual are the members within the meaning of paragraph (6).

(6) MEMBER OF FAMILY.—For purposes of paragraph (2)(F), the family of any individual shall include his spouse, ancestor, lineal descendant, and any spouse of a lineal descendant.

(7) EMPLOYEE STOCK OWNERSHIP PLAN.—The term "employee stock ownership plan" means a defined contribution plan—

(A) which is a stock bonus plan which is qualified, or a stock bonus and a money purchase plan both of which are qualified under section 401(a), and which are designed to invest primarily in qualifying employer securities; and

(B) which is otherwise defined in regulations prescribed by the Secretary.

A plan shall not be treated as an employee stock ownership plan unless it meets the requirements of section 409(h), section 409(o), and, if applicable, section 409(n), section 409(p), and section 664(g) and, if the employer has a registration-type class of securities (as defined in section 409(e)(4)), it meets the requirements of section 409(e).

(8) QUALIFYING EMPLOYER SECURITY.—The term "qualifying employer security" means any employer security within the meaning of section 409(l). If any moneys or other property of a plan are invested in shares of an investment company registered under the Investment Company Act of 1940, the investment shall not cause that investment company or that investment company's investment adviser or principal underwriter to be treated as a fiduciary or a disqualified person for purposes of this section, except when an investment company or its investment adviser or principal underwriter acts in connection with a plan covering employees of the investment company, its investment adviser, or its principal underwriter.

(9) SECTION MADE APPLICABLE TO WITHDRAWAL LIABILITY PAYMENT FUNDS.—For purposes of this section—

(A) IN GENERAL.—The term "plan" includes a trust described in section 501(c)(22).

(B) DISQUALIFIED PERSON.—In the case of any trust to which this section applies by reason of subparagraph (A), the term "disqualified person" includes any person who is a disqualified person with respect to any plan to which

such trust is permitted to make payments under section 4223 of the Employee Retirement Income Security Act of 1974.

(f) OTHER DEFINITIONS AND SPECIAL RULES.—For purposes of this section—

(1) JOINT AND SEVERAL LIABILITY.—If more than one person is liable under subsection (a) or (b) with respect to any one prohibited transaction, all such persons shall be jointly and severally liable under such subsection with respect to such transaction.

(2) TAXABLE PERIOD.—The term "taxable period" means, with respect to any prohibited transaction, the period beginning with the date on which the prohibited transaction occurs and ending on the earliest of—

(A) the date of mailing a notice of deficiency with respect to the tax imposed by subsection (a) under section 6212,

(B) the date on which the tax imposed by subsection (a) is assessed, or

(C) the date on which correction of the prohibited transaction is completed.

(3) SALE OR EXCHANGE; ENCUMBERED PROPERTY.—A transfer or real or personal property by a disqualified person to a plan shall be treated as a sale or exchange if the property is subject to a mortgage or similar lien which the plan assumes or if it is subject to a mortgage or similar lien which a disqualified person placed on the property within the 10-year period ending on the date of the transfer.

(4) AMOUNT INVOLVED.—The term "amount involved" means, with respect to a prohibited transaction, the greater of the amount of money and the fair market value of the other property given or the amount of money and the fair market value of the other property received; except that, in the case of services described in paragraphs (2) and (10) of subsection (d) the amount involved shall be only the excess compensation. For purposes of the preceding sentence, the fair market value—

(A) in the case of the tax imposed by subsection (a), shall be determined as of the date on which the prohibited transaction occurs; and

(B) in the case of the tax imposed by subsection (b), shall be the highest fair market value during the taxable period.

(5) CORRECTION.—The terms "correction" and "correct" mean, with respect to a prohibited transaction, undoing the transaction to the extent possible, but in any case placing the plan in a financial position not worse than that in which it would be if the disqualified person were acting under the highest fiduciary standards.

(6) EXEMPTIONS NOT TO APPLY TO CERTAIN TRANSACTIONS.—

(A) IN GENERAL.—In the case of a trust described in section 401(a) which is part of a plan providing contributions or benefits for employees some or all of whom are owner-employees (as defined in section 401(c)(3)), the exemptions provided by subsection (d) (other than paragraphs (9) and (12)) shall not apply to a transaction in which the plan directly or indirectly—

(i) lends any part of the corpus or income of the plan to,

(ii) pays any compensation for personal services rendered to the plan to, or

(iii) acquires for the plan any property from, or sells any property to,

any such owner-employee, a member of the family (as defined in section 267(c)(4)) of any such owner-employee, or any corporation in which any such owner-employee owns, directly or indirectly, 50 percent or more of the total combined voting power of all classes of stock entitled to vote or 50 percent or more of the total value of shares of all classes of stock of the corporation.

(B) Special rules for shareholder-employees, etc.

(i) IN GENERAL.—For purposes of subparagraph (A), the following shall be treated as owner-employees:

(I) A shareholder-employee.

(II) A participant or beneficiary of an individual retirement plan (as defined in section 7701(a)(37)).

(III) An employer or association of employees which establishes such an individual retirement plan under section 408(c).

(ii) EXCEPTION FOR CERTAIN TRANSACTIONS INVOLVING SHAREHOLDER-EMPLOYEES.—Subparagraph (A)(iii) shall not apply to a transaction which consists of a sale of employer securities to an employee stock ownership plan (as defined in subsection (e)(7)) by a shareholder- employee, a member of the family (as defined in section 267(c)(4)) of such shareholder-employee, or a corporation in which such a shareholder-employee owns stock representing a 50 percent or greater interest described in subparagraph (A).

(iii) LOAN EXCEPTION.—For purposes of subparagraph (A)(i), the term "owner-employee" shall only include a person described in subclause (II) or (III) of clause (i).

(C) SHAREHOLDER-EMPLOYEE.—For purposes of subparagraph (B), the term "shareholder-employee" means an employee or officer of an S corporation who owns (or is considered as owning within the meaning of section 318(a)(1)) more than 5 percent of the outstanding stock of the corporation on any day during the taxable year of such corporation.

(7) S CORPORATION REPAYMENT OF LOANS FOR QUALIFYING EMPLOYER SECURITIES.—A plan shall not be treated as violating the requirements of section 401 or 409 or subsection (e)(7), or as engaging in a prohibited transaction for purposes of subsection (d)(3), merely by reason of any distribution (as described in section 1368(a)) with respect to S corporation stock that constitutes qualifying employer securities, which in accordance with the plan provisions is used to make payments on a loan described in subsection (d)(3) the proceeds of which were used to acquire such qualifying employer securities (whether or not allocated to participants). The preceding sentence shall not apply in the case of a distribution which is paid

with respect to any employer security which is allocated to a participant unless the plan provides that employer securities with a fair market value of not less than the amount of such distribution are allocated to such participant for the year which (but for the preceding sentence) such distribution would have been allocated to such participant.

(8) PROVISION OF INVESTMENT ADVICE TO PARTICIPANT AND BENEFICIARIES.—

(A) IN GENERAL.—The prohibitions provided in subsection (c) shall not apply to transactions described in subsection (d)(17) if the investment advice provided by a fiduciary adviser is provided under an eligible investment advice arrangement.

(B) ELIGIBLE INVESTMENT ADVICE ARRANGEMENT.—For purposes of this paragraph, the term "eligible investment advice arrangement" means an arrangement—

(i) which either—

(I) provides that any fees (including any commission or other compensation) received by the fiduciary adviser for investment advice or with respect to the sale, holding, or acquisition of any security or other property for purposes of investment of plan assets do not vary depending on the basis of any investment option selected, or

(II) uses a computer model under an investment advice program meeting the requirements of subparagraph (C) in connection with the provision of investment advice by a fiduciary adviser to a participant or beneficiary, and

(ii) with respect to which the requirements of subparagraphs (D), (E), (F), (G), (H), and (I) are met.

(C) INVESTMENT ADVICE PROGRAM USING COMPUTER MODEL.—

(i) IN GENERAL.—An investment advice program meets the requirements of this subparagraph if the requirements of clauses (ii), (iii), and (iv) are met.

(ii) COMPUTER MODEL.—The requirements of this clause are met if the investment advice provided under the investment advice program is provided pursuant to a computer model that—

(I) applies generally accepted investment theories that take into account the historic returns of different asset classes over defined periods of time,

(II) utilizes relevant information about the participant, which may include age, life expectancy, retirement age, risk tolerance, other assets or sources of income, and preferences as to certain types of investments,

(III) utilizes prescribed objective criteria to provide asset allocation portfolios comprised of investment options available under the plan,

(IV) operates in a manner that is not biased in favor of investments offered by the fiduciary adviser or a person with a material affiliation or con-

tractual relationship with the fiduciary adviser, and

(V) takes into account all investment options under the plan in specifying how a participant's account balance should be invested and is not inappropriately weighted with respect to any investment option.

(iii) CERTIFICATION.—

(I) IN GENERAL.—The requirements of this clause are met with respect to any investment advice program if an eligible investment expert certifies, prior to the utilization of the computer model and in accordance with rules prescribed by the Secretary of Labor, that the computer model meets the requirements of clause (ii).

(II) RENEWAL OF CERTIFICATIONS.—If, as determined under regulations prescribed by the Secretary of Labor, there are material modifications to a computer model, the requirements of this clause are met only if a certification described in subclause (I) is obtained with respect to the computer model as so modified.

(III) ELIGIBLE INVESTMENT EXPERT.—The term "eligible investment expert" means any person which meets such requirements as the Secretary of Labor may provide and which does not bear any material affiliation or contractual relationship with any investment adviser or a related person thereof (or any employee, agent, or registered representative of the investment adviser or related person).

(iv) EXCLUSIVITY OF RECOMMENDATION.—The requirements of this clause are met with respect to any investment advice program if—

(I) the only investment advice provided under the program is the advice generated by the computer model described in clause (ii), and

(II) any transaction described in subsection (d)(17)(A)(ii) occurs solely at the direction of the participant or beneficiary.

Nothing in the preceding sentence shall preclude the participant or beneficiary from requesting investment advice other than that described in clause (i), but only if such request has not been solicited by any person connected with carrying out the arrangement.

(D) EXPRESS AUTHORIZATION BY SEPARATE FIDUCIARY.—The requirements of this subparagraph are met with respect to an arrangement if the arrangement is expressly authorized by a plan fiduciary other than the person offering the investment advice program, any person providing investment options under the plan, or any affiliate of either.

(E) AUDITS.—

(i) IN GENERAL.—The requirements of this subparagraph are met if an independent auditor, who has ap-

propriate technical training or experience and proficiency and so represents in writing—

(I) conducts an annual audit of the arrangement for compliance with the requirements of this paragraph, and

(II) following completion of the annual audit, issues a written report to the fiduciary who authorized use of the arrangement which presents its specific findings regarding compliance of the arrangement with the requirements of this paragraph.

(ii) SPECIAL RULE FOR INDIVIDUAL RETIREMENT AND SIMILAR PLANS.—In the case of a plan described in subparagraphs (B) through (F) (and so much of subparagraph (G) as relates to such subparagraphs) of subsection (e)(1), in lieu of the requirements of clause (i), audits of the arrangement shall be conducted at such times and in such manner as the Secretary of Labor may prescribe.

(iii) INDEPENDENT AUDITOR.—For purposes of this subparagraph, an auditor is considered independent if it is not related to the person offering the arrangement to the plan and is not related to any person providing investment options under the plan.

(F) DISCLOSURE.—The requirements of this subparagraph are met if—

(i) the fiduciary adviser provides to a participant or a beneficiary before the initial provision of the investment advice with regard to any security or other property offered as an investment option, a written notification (which may consist of notification by means of electronic communication)—

(I) of the role of any party that has a material affiliation or contractual relationship with the fiduciary adviser, in the development of the investment advice program and in the selection of investment options available under the plan,

(II) of the past performance and historical rates of return of the investment options available under the plan,

(III) of all fees or other compensation relating to the advice that the fiduciary adviser or any affiliate thereof is to receive (including compensation provided by any third party) in connection with the provision of the advice or in connection with the sale, acquisition, or holding of the security or other property,

(IV) of any material affiliation or contractual relationship of the fiduciary adviser or affiliates thereof in the security or other property,

(V) the manner, and under what circumstances, any participant or beneficiary information provided under the arrangement will be used or disclosed,

(VI) of the types of services provided by the fiduciary adviser in connection with the provision of investment advice by the fiduciary adviser,

(VII) that the adviser is acting as a fiduciary of the plan in connection with the provision of the advice, and

(VIII) that a recipient of the advice may separately arrange for the provision of advice by another adviser, that could have no material affiliation with and receive no fees or other compensation in connection with the security or other property, and

(ii) at all times during the provision of advisory services to the participant or beneficiary, the fiduciary adviser—

(I) maintains the information described in clause (i) in accurate form and in the manner described in subparagraph (H),

(II) provides, without charge, accurate information to the recipient of the advice no less frequently than annually,

(III) provides, without charge, accurate information to the recipient of the advice upon request of the recipient, and

(IV) provides, without charge, accurate information to the recipient of the advice concerning any material change to the information required to be provided to the recipient of the advice at a time reasonably contemporaneous to the change in information.

(G) OTHER CONDITIONS.—The requirements of this subparagraph are met if—

(i) the fiduciary adviser provides appropriate disclosure, in connection with the sale, acquisition, or holding of the security or other property, in accordance with all applicable securities laws,

(ii) the sale, acquisition, or holding occurs solely at the direction of the recipient of the advice,

(iii) the compensation received by the fiduciary adviser and affiliates thereof in connection with the sale, acquisition, or holding of the security or other property is reasonable, and

(iv) the terms of the sale, acquisition, or holding of the security or other property are at least as favorable to the plan as an arm's length transaction would be.

(H) STANDARDS FOR PRESENTATION OF INFORMATION.—

(i) IN GENERAL.—The requirements of this subparagraph are met if the notification required to be provided to participants and beneficiaries under subparagraph (F)(i) is written in a clear and conspicuous manner and in a manner calculated to be understood by the average plan participant and is sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of the information required to be provided in the notification.

(ii) MODEL FORM FOR DISCLOSURE OF FEES AND OTHER COMPENSATION.—The Secretary of Labor shall issue a model form for the disclosure of fees and other compensation required in subparagraph (F)(i)(III) which meets the requirements of clause (i).

(I) MAINTENANCE FOR 6 YEARS OF EVIDENCE OF COMPLIANCE.—The requirements of this subparagraph are met if a fiduciary adviser who has provided advice referred to in subparagraph (A) maintains, for a period of not less than 6 years after the provision of the advice, any records necessary for determining whether the requirements of the preceding provisions of this paragraph and of subsection (d)(17) have been met. A transaction prohibited under subsection (c) shall not be considered to have occurred solely because the records are lost or destroyed prior to the end of the 6-year period due to circumstances beyond the control of the fiduciary adviser.

(J) DEFINITIONS.—For purposes of this paragraph and subsection (d)(17)—

(i) FIDUCIARY ADVISER.—The term "fiduciary adviser" means, with respect to a plan, a person who is a fiduciary of the plan by reason of the provision of investment advice referred to in subsection (e)(3)(B) by the person to a participant or beneficiary of the plan and who is—

(I) registered as an investment adviser under the Investment Advisers Act of 1940 (15 U.S.C. 80b-1 et seq.) or under the laws of the State in which the fiduciary maintains its principal office and place of business,

(II) a bank or similar financial institution referred to in subsection (d)(4) or a savings association (as defined in section 3(b)(1) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(1)), but only if the advice is provided through a trust department of the bank or similar financial institution or savings association which is subject to periodic examination and review by Federal or State banking authorities,

(III) an insurance company qualified to do business under the laws of a State,

(IV) a person registered as a broker or dealer under the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.),

(V) an affiliate of a person described in any of subclauses (I) through (IV), or

(VI) an employee, agent, or registered representative of a person described in subclauses (I) through (V) who satisfies the requirements of applicable insurance, banking, and securities laws relating to the provision of the advice.

For purposes of this title, a person who develops the computer model described in subparagraph (C)(ii) or markets the investment advice program or computer model shall be treated as a person who is a fiduciary

of the plan by reason of the provision of investment advice referred to in subsection (e)(3)(B) to a participant or beneficiary and shall be treated as a fiduciary adviser for purposes of this paragraph and subsection (d)(17), except that the Secretary of Labor may prescribe rules under which only 1 fiduciary adviser may elect to be treated as a fiduciary with respect to the plan.

(ii) AFFILIATE.—The term "affiliate" of another entity means an affiliated person of the entity (as defined in section 2(a)(3) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(a)(3))).

(iii) REGISTERED REPRESENTATIVE.—The term "registered representative" of another entity means a person described in section 3(a)(18) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(18)) (substituting the entity for the broker or dealer referred to in such section) or a person described in section 202(a)(17) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-2(a)(17)) (substituting the entity for the investment adviser referred to in such section).

(9) BLOCK TRADE.—The term "block trade" means any trade of at least 10,000 shares or with a market value of at least $200,000 which will be allocated across two or more unrelated client accounts of a fiduciary.

(10) ADEQUATE CONSIDERATION.—The term "adequate consideration" means—

(A) in the case of a security for which there is a generally recognized market—

(i) the price of the security prevailing on a national securities exchange which is registered under section 6 of the Securities Exchange Act of 1934, taking into account factors such as the size of the transaction and marketability of the security, or

(ii) if the security is not traded on such a national securities exchange, a price not less favorable to the plan than the offering price for the security as established by the current bid and asked prices quoted by persons independent of the issuer and of the party in interest, taking into account factors such as the size of the transaction and marketability of the security, and

(B) in the case of an asset other than a security for which there is a generally recognized market, the fair market value of the asset as determined in good faith by a fiduciary or fiduciaries in accordance with regulations prescribed by the Secretary of Labor.

(11) CORRECTION PERIOD.—

(A) IN GENERAL.—For purposes of subsection (d)(23), the term "correction period" means the 14-day period beginning on the date on which the disqualified person discovers, or reasonably should have discovered, that the transaction would (without regard to this paragraph and subsection (d)(23)) constitute a prohibited transaction.

(B) EXCEPTIONS.—

(i) EMPLOYER SECURITIES.—Subsection (d)(23) does not apply to any transaction between a plan and a plan sponsor or its affiliates that involves the acquisition or sale of an employer security (as defined in section 407(d)(1) of the Employee Retirement Income Security Act of 1974) or the acquisition, sale, or lease of employer real property (as defined in section 407(d)(2) of such Act).

(ii) KNOWING PROHIBITED TRANSACTION.—In the case of any disqualified person, subsection (d)(23) does not apply to a transaction if, at the time the transaction is entered into, the disqualified person knew (or reasonably should have known) that the transaction would (without regard to this paragraph) constitute a prohibited transaction.

(C) ABATEMENT OF TAX WHERE THERE IS A CORRECTION.—If a transaction is not treated as a prohibited transaction by reason of subsection (d)(23), then no tax under subsections (a) and (b) shall be assessed with respect to such transaction, and if assessed the assessment shall be abated, and if collected shall be credited or refunded as an overpayment.

(D) DEFINITIONS.—For purposes of this paragraph and subsection (d)(23)—

(i) SECURITY.—The term "security" has the meaning given such term by section 475(c)(2) (without regard to subparagraph (F)(iii) and the last sentence thereof).

(ii) COMMODITY.—The term "commodity" has the meaning given such term by section 475(e)(2) (without regard to subparagraph (D)(iii) thereof).

(iii) CORRECT.—The term "correct" means, with respect to a transaction—

(I) to undo the transaction to the extent possible and in any case to make good to the plan or affected account any losses resulting from the transaction, and

(II) to restore to the plan or affected account any profits made through the use of assets of the plan.

(g) APPLICATION OF SECTION.—This section shall not apply—

(1) in the case of a plan to which a guaranteed benefit policy (as defined in section 401(b)(2)(B) of the Employee Retirement Income Security Act of 1974) is issued, to any assets of the insurance company, insurance service, or insurance organization merely because of its issuance of such policy;

(2) to a governmental plan (within the meaning of section 414(d)); or

(3) to a church plan (within the meaning of section 414(e)) with respect to which the election provided by section 410(d) has not been made.

In the case of a plan which invests in any security issued by an investment company registered under the Investment Company Act of 1940, the assets of such plan shall be deemed to include such security but shall not, by reason of such investment, be deemed to include any assets of such company.

(h) NOTIFICATION OF SECRETARY OF LABOR.—Before sending a notice of deficiency with respect to the tax imposed by subsection (a) or (b), the Secretary shall notify the Secretary of Labor and provide him a reasonable opportunity to obtain a correction of the prohibited transaction or to comment on the imposition of such tax.

(i) CROSS REFERENCE.—For provisions concerning coordination procedures between Secretary of Labor and Secretary of the Treasury with respect to application of tax imposed by this section and for authority to waive imposition of the tax imposed by subsection (b), see section 3003 of the Employee Retirement Income Security Act of 1974.

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B. CHANGES IN EXISTING LAW PROPOSED BY THE BILL, AS REPORTED

In compliance with clause 3(e)(1)(B) of rule XIII of the Rules of the House of Representatives, changes in existing law proposed by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e)(1)(B) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, and existing law in which no change is proposed is shown in roman):

INTERNAL REVENUE CODE OF 1986

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Subtitle D—Miscellaneous Excise Taxes

CHAPTER 43—QUALIFIED PENSION, ETC., PLANS

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SEC. 4975. TAX ON PROHIBITED TRANSACTIONS.

(a) INITIAL TAXES ON DISQUALIFIED PERSON.—There is hereby imposed a tax on each prohibited transaction. The rate of tax shall be equal to 15 percent of the amount involved with respect to the prohibited transaction for each year (or part thereof) in the taxable period. The tax imposed by this subsection shall be paid by any disqualified person who participates in the prohibited transaction (other than a fiduciary acting only as such).

(b) ADDITIONAL TAXES ON DISQUALIFIED PERSON.—In any case in which an initial tax is imposed by subsection (a) on a prohibited transaction and the transaction is not corrected within the taxable period, there is hereby imposed a tax equal to 100 percent of the amount involved. The tax imposed by this subsection shall be paid

by any disqualified person who participated in the prohibited transaction (other than a fiduciary acting only as such).

(c) PROHIBITED TRANSACTION.—

(1) GENERAL RULE.—For purposes of this section, the term "prohibited transaction" means any direct or indirect—

(A) sale or exchange, or leasing, of any property between a plan and a disqualified person;

(B) lending of money or other extension of credit between a plan and a disqualified person;

(C) furnishing of goods, services, or facilities between a plan and a disqualified person;

(D) transfer to, or use by or for the benefit of, a disqualified person of the income or assets of a plan;

(E) act by a disqualified person who is a fiduciary whereby he deals with the income or assets of a plan in his own interests or for his own account; or

(F) receipt of any consideration for his own personal account by any disqualified person who is a fiduciary from any party dealing with the plan in connection with a transaction involving the income or assets of the plan.

(2) SPECIAL EXEMPTION.—The Secretary shall establish an exemption procedure for purposes of this subsection. Pursuant to such procedure, he may grant a conditional or unconditional exemption of any disqualified person or transaction, orders of disqualified persons or transactions, from all or part of the restrictions imposed by paragraph (1) of this subsection. Action under this subparagraph may be taken only after consultation and coordination with the Secretary of Labor. The Secretary may not grant an exemption under this paragraph unless he finds that such exemption is—

(A) administratively feasible,

(B) in the interests of the plan and of its participants and beneficiaries, and

(C) protective of the rights of participants and beneficiaries of the plan.

Before granting an exemption under this paragraph, the Secretary shall require adequate notice to be given to interested persons and shall publish notice in the Federal Register of the pendency of such exemption and shall afford interested persons an opportunity to present views. No exemption may be granted under this paragraph with respect to a transaction described in subparagraph (E) or (F) of paragraph (1) unless the Secretary affords an opportunity for a hearing and makes a determination on the record with respect to the findings required under subparagraphs (A), (B), and (C) of this paragraph, except that in lieu of such hearing the Secretary may accept any record made by the Secretary of Labor with respect to an application for exemption under section 408(a) of title I of the Employee Retirement Income Security Act of 1974.

(3) SPECIAL RULE FOR INDIVIDUAL RETIREMENT ACCOUNTS.—An individual for whose benefit an individual retirement account is established and his beneficiaries shall be exempt from the tax imposed by this section with respect to any transaction concerning such account (which would otherwise be taxable under this section) if, with respect to such transaction, the ac-

count ceases to be an individual retirement account by reason of the application of section 408(e)(2)(A) or if section 408(e)(4) applies to such account.

(4) SPECIAL RULE FOR ARCHER MSAS.—An individual for whose benefit an Archer MSA (within the meaning of section 220(d)) is established shall be exempt from the tax imposed by this section with respect to any transaction concerning such account (which would otherwise be taxable under this section) if section 220(e)(2) applies to such transaction.

(5) SPECIAL RULE FOR COVERDELL EDUCATION SAVINGS ACCOUNTS.—An individual for whose benefit a Coverdell education savings account is established and any contributor to such account shall be exempt from the tax imposed by this section with respect to any transaction concerning such account (which would otherwise be taxable under this section) if section 530(d) applies with respect to such transaction.

(6) SPECIAL RULE FOR HEALTH SAVINGS ACCOUNTS.—An individual for whose benefit a health savings account (within the meaning of section 223(d)) is established shall be exempt from the tax imposed by this section with respect to any transaction concerning such account (which would otherwise be taxable under this section) if, with respect to such transaction, the account ceases to be a health savings account by reason of the application of section 223(e)(2) to such account.

(d) EXEMPTIONS.—Except as provided in subsection (f)(6), the prohibitions provided in subsection (c) shall not apply to—

(1) any loan made by the plan to a disqualified person who is a participant or beneficiary of the plan if such loan—

(A) is available to all such participants or beneficiaries on a reasonably equivalent basis,

(B) is not made available to highly compensated employees (within the meaning of section 414(q)) in an amount greater than the amount made available to other employees,

(C) is made in accordance with specific provisions regarding such loans set forth in the plan,

(D) bears a reasonable rate of interest, and

(E) is adequately secured;

(2) any contract, or reasonable arrangement, made with a disqualified person for office space, or legal, accounting, or other services necessary for the establishment or operation of the plan, if no more than reasonable compensation is paid therefor;

(3) any loan to an leveraged employee stock ownership plan (as defined in subsection (e)(7)), if—

(A) such loan is primarily for the benefit of participants and beneficiaries of the plan, and

(B) such loan is at a reasonable rate of interest, and any collateral which is given to a disqualified person by the plan consists only of qualifying employer securities (as defined in subsection (e)(8));

(4) the investment of all or part of a plan's assets in deposits which bear a reasonable interest rate in a bank or similar financial institution supervised by the United States or a State,

if such bank or other institution is a fiduciary of such plan and if—

(A) the plan covers only employees of such bank or other institution and employees of affiliates of such bank or other institution, or

(B) such investment is expressly authorized by a provision of the plan or by a fiduciary (other than such bank or institution or affiliates thereof) who is expressly empowered by the plan to so instruct the trustee with respect to such investment;

(5) any contract for life insurance, health insurance, or annuities with one or more insurers which are qualified to do business in a State if the plan pays no more than adequate consideration, and if each such insurer or insurers is—

(A) the employer maintaining the plan, or

(B) a disqualified person which is wholly owned (directly or indirectly) by the employer establishing the plan, or by any person which is a disqualified person with respect to the plan, but only if the total premiums and annuity considerations written by such insurers for life insurance, health insurance, or annuities for all plans (and their employers) with respect to which such insurers are disqualified persons (not including premiums or annuity considerations written by the employer maintaining the plan) do not exceed 5 percent of the total premiums and annuity considerations written for all lines of insurance in that year by such insurers (not including premiums or annuity considerations written by the employer maintaining the plan);

(6) the provision of any ancillary service by a bank or similar financial institution supervised by the United States or a State, if such service is provided at not more than reasonable compensation, if such bank or other institution is a fiduciary of such plan, and if—

(A) such bank or similar financial institution has adopted adequate internal safeguards which assure that the provision of such ancillary service is consistent with sound banking and financial practice, as determined by Federal or State supervisory authority, and

(B) the extent to which such ancillary service is provided is subject to specific guidelines issued by such bank or similar financial institution (as determined by the Secretary after consultation with Federal and State supervisory authority), and under such guidelines the bank or similar financial institution does not provide such ancillary service—

(i) in an excessive or unreasonable manner, and

(ii) in a manner that would be inconsistent with the best interests of participants and beneficiaries of employee benefit plans;

(7) the exercise of a privilege to convert securities, to the extent provided in regulations of the Secretary but only if the plan receives no less than adequate consideration pursuant to such conversion;

(8) any transaction between a plan and a common or collective trust fund or pooled investment fund maintained by a disqualified person which is a bank or trust company supervised by a State or Federal agency or between a plan and a pooled investment fund of an insurance company qualified to do business in a State if—

(A) the transaction is a sale or purchase of an interest in the fund,

(B) the bank, trust company, or insurance company receives not more than a reasonable compensation, and

(C) such transaction is expressly permitted by the instrument under which the plan is maintained, or by a fiduciary (other than the bank, trust company, or insurance company, or an affiliate thereof) who has authority to manage and control the assets of the plan;

(9) receipt by a disqualified person of any benefit to which he may be entitled as a participant or beneficiary in the plan, so long as the benefit is computed and paid on a basis which is consistent with the terms of the plan as applied to all other participants and beneficiaries;

(10) receipt by a disqualified person of any reasonable compensation for services rendered, or for the reimbursement of expenses properly and actually incurred, in the performance of his duties with the plan, but no person so serving who already receives full-time pay from an employer or an association of employers, whose employees are participants in the plan or from an employee organization whose members are participants in such plan shall receive compensation from such fund, except for reimbursement of expenses properly and actually incurred;

(11) service by a disqualified person as a fiduciary in addition to being an officer, employee, agent, or other representative of a disqualified person;

(12) the making by a fiduciary of a distribution of the assets of the trust in accordance with the terms of the plan if such assets are distributed in the same manner as provided under section 4044 of title IV of the Employee Retirement Income Security Act of 1974 (relating to allocation of assets);

(13) any transaction which is exempt from section 406 of such Act by reason of section 408(e) of such Act (or which would be so exempt if such section 406 applied to such transaction) or which is exempt from section 406 of such Act by reason of section 408(b)(12) of such Act;

(14) any transaction required or permitted under part 1 of subtitle E of title IV or section 4223 of the Employee Retirement Income Security Act of 1974, but this paragraph shall not apply with respect to the application of subsection (c)(1) (E) or (F);

(15) a merger of multiemployer plans, or the transfer of assets or liabilities between multiemployer plans, determined by the Pension Benefit Guaranty Corporation to meet the requirements of section 4231 of such Act, but this paragraph shall not apply with respect to the application of subsection (c)(1) (E) or (F);

(16) a sale of stock held by a trust which constitutes an individual retirement account under section 408(a) to the individual for whose benefit such account is established if—

(A) such stock is in a bank (as defined in section 581) or a depository institution holding company (as defined in section 3(w)(1) of the Federal Deposit Insurance Act (12 U.S.C. 1813(w)(1)),

(B) such stock is held by such trust as of the date of the enactment of this paragraph,

(C) such sale is pursuant to an election under section 1362(a) by such bank or company,

(D) such sale is for fair market value at the time of sale (as established by an independent appraiser) and the terms of the sale are otherwise at least as favorable to such trust as the terms that would apply on a sale to an unrelated party,

(E) such trust does not pay any commissions, costs, or other expenses in connection with the sale, and

(F) the stock is sold in a single transaction for cash not later than 120 days after the S corporation election is made;

(17) Any transaction in connection with the provision of investment advice described in subsection (e)(3)(B) to a participant or beneficiary in a plan that permits such participant or beneficiary to direct the investment of plan assets in an individual account, if—

(A) the transaction is—

(i) the provision of the investment advice to the participant or beneficiary of the plan with respect to a security or other property available as an investment under the plan,

(ii) the acquisition, holding, or sale of a security or other property available as an investment under the plan pursuant to the investment advice, or

(iii) the direct or indirect receipt of fees or other compensation by the fiduciary adviser or an affiliate thereof (or any employee, agent, or registered representative of the fiduciary adviser or affiliate) in connection with the provision of the advice or in connection with an acquisition, holding, or sale of a security or other property available as an investment under the plan pursuant to the investment advice; and

(B) the requirements of subsection (f)(8) are met,

(18) any transaction involving the purchase or sale of securities, or other property (as determined by the Secretary of Labor), between a plan and a disqualified person (other than a fiduciary described in subsection (e)(3)) with respect to a plan if—

(A) the transaction involves a block trade,

(B) at the time of the transaction, the interest of the plan (together with the interests of any other plans maintained by the same plan sponsor), does not exceed 10 percent of the aggregate size of the block trade,

(C) the terms of the transaction, including the price, are at least as favorable to the plan as an arm's length transaction, and

(D) the compensation associated with the purchase and sale is not greater than the compensation associated with an arm's length transaction with an unrelated party,

(19) any transaction involving the purchase or sale of securities, or other property (as determined by the Secretary of Labor), between a plan and a disqualified person if—

(A) the transaction is executed through an electronic communication network, alternative trading system, or similar execution system or trading venue subject to regulation and oversight by—

(i) the applicable Federal regulating entity, or

(ii) such foreign regulatory entity as the Secretary of Labor may determine by regulation,

(B) either—

(i) the transaction is effected pursuant to rules designed to match purchases and sales at the best price available through the execution system in accordance with applicable rules of the Securities and Exchange Commission or other relevant governmental authority, or

(ii) neither the execution system nor the parties to the transaction take into account the identity of the parties in the execution of trades,

(C) the price and compensation associated with the purchase and sale are not greater than the price and compensation associated with an arm's length transaction with an unrelated party,

(D) if the disqualified person has an ownership interest in the system or venue described in subparagraph (A), the system or venue has been authorized by the plan sponsor or other independent fiduciary for transactions described in this paragraph, and

(E) not less than 30 days prior to the initial transaction described in this paragraph executed through any system or venue described in subparagraph (A), a plan fiduciary is provided written or electronic notice of the execution of such transaction through such system or venue,

(20) transactions described in subparagraphs (A), (B), and (D) of subsection (c)(1) between a plan and a person that is a disqualified person other than a fiduciary (or an affiliate) who has or exercises any discretionary authority or control with respect to the investment of the plan assets involved in the transaction or renders investment advice (within the meaning of subsection (e)(3)(B)) with respect to those assets, solely by reason of providing services to the plan or solely by reason of a relationship to such a service provider described in subparagraph (F), (G), (H), or (I) of subsection (e)(2), or both, but only if in connection with such transaction the plan receives no less, nor pays no more, than adequate consideration,

(21) any foreign exchange transactions, between a bank or broker-dealer (or any affiliate of either) and a plan (as defined in this section) with respect to which such bank or broker-deal-

er (or affiliate) is a trustee, custodian, fiduciary, or other disqualified person person, if—

(A) the transaction is in connection with the purchase, holding, or sale of securities or other investment assets (other than a foreign exchange transaction unrelated to any other investment in securities or other investment assets),

(B) at the time the foreign exchange transaction is entered into, the terms of the transaction are not less favorable to the plan than the terms generally available in comparable arm's length foreign exchange transactions between unrelated parties, or the terms afforded by the bank or broker-dealer (or any affiliate of either) in comparable arm's-length foreign exchange transactions involving unrelated parties,

(C) the exchange rate used by such bank or broker-dealer (or affiliate) for a particular foreign exchange transaction does not deviate by more than 3 percent from the interbank bid and asked rates for transactions of comparable size and maturity at the time of the transaction as displayed on an independent service that reports rates of exchange in the foreign currency market for such currency, and

(D) the bank or broker-dealer (or any affiliate of either) does not have investment discretion, or provide investment advice, with respect to the transaction,

(22) any transaction described in subsection (c)(1)(A) involving the purchase and sale of a security between a plan and any other account managed by the same investment manager, if—

(A) the transaction is a purchase or sale, for no consideration other than cash payment against prompt delivery of a security for which market quotations are readily available,

(B) the transaction is effected at the independent current market price of the security (within the meaning of section 270.17a-7(b) of title 17, Code of Federal Regulations),

(C) no brokerage commission, fee (except for customary transfer fees, the fact of which is disclosed pursuant to subparagraph (D)), or other remuneration is paid in connection with the transaction,

(D) a fiduciary (other than the investment manager engaging in the cross-trades or any affiliate) for each plan participating in the transaction authorizes in advance of any cross-trades (in a document that is separate from any other written agreement of the parties) the investment manager to engage in cross trades at the investment manager's discretion, after such fiduciary has received disclosure regarding the conditions under which cross trades may take place (but only if such disclosure is separate from any other agreement or disclosure involving the asset management relationship), including the written policies and procedures of the investment manager described in subparagraph (H),

(E) each plan participating in the transaction has assets of at least $100,000,000, except that if the assets of a plan

are invested in a master trust containing the assets of plans maintained by employers in the same controlled group (as defined in section 407(d)(7) of the Employee Retirement Income Security Act of 1974), the master trust has assets of at least $100,000,000,

(F) the investment manager provides to the plan fiduciary who authorized cross trading under subparagraph (D) a quarterly report detailing all cross trades executed by the investment manager in which the plan participated during such quarter, including the following information, as applicable: (i) the identity of each security bought or sold; (ii) the number of shares or units traded; (iii) the parties involved in the cross-trade; and (iv) trade price and the method used to establish the trade price,

(G) the investment manager does not base its fee schedule on the plan's consent to cross trading, and no other service (other than the investment opportunities and cost savings available through a cross trade) is conditioned on the plan's consent to cross trading,

(H) the investment manager has adopted, and cross-trades are effected in accordance with, written cross-trading policies and procedures that are fair and equitable to all accounts participating in the cross-trading program, and that include a description of the manager's pricing policies and procedures, and the manager's policies and procedures for allocating cross trades in an objective manner among accounts participating in the cross-trading program, and

(I) the investment manager has designated an individual responsible for periodically reviewing such purchases and sales to ensure compliance with the written policies and procedures described in subparagraph (H), and following such review, the individual shall issue an annual written report no later than 90 days following the period to which it relates signed under penalty of perjury to the plan fiduciary who authorized cross trading under subparagraph (D) describing the steps performed during the course of the review, the level of compliance, and any specific instances of non-compliance.

The written report shall also notify the plan fiduciary of the plan's right to terminate participation in the investment manager's cross-trading program at any time, **[**or**]**

(23) except as provided in subsection (f)(11), a transaction described in subparagraph (A), (B), (C), or (D) of subsection (c)(1) in connection with the acquisition, holding, or disposition of any security or commodity, if the transaction is corrected before the end of the correction period**[**.**]**, *or*

(24) provision of investment advice by a fiduciary to a plan, plan participant, or beneficiary with respect to the plan, which is a best interest recommendation or a transaction connected to such advice.

(e) DEFINITIONS.—

(1) PLAN.—For purposes of this section, the term "plan" means—

(A) a trust described in section 401(a) which forms a part of a plan, or a plan described in section 403(a), which trust or plan is exempt from tax under section 501(a),

(B) an individual retirement account described in section 408(a),

(C) an individual retirement annuity described in section 408(b),

(D) an Archer MSA described in section 220(d),

(E) a health savings account described in section 223(d),

(F) a Coverdell education savings account described in section 530, or

(G) a trust, plan, account, or annuity which, at any time, has been determined by the Secretary to be described in any preceding subparagraph of this paragraph.

(2) DISQUALIFIED PERSON.—For purposes of this section, the term "disqualified person" means a person who is—

(A) a fiduciary;

(B) a person providing services to the plan;

(C) an employer any of whose employees are covered by the plan;

(D) an employee organization any of whose members are covered by the plan;

(E) an owner, direct or indirect, of 50 percent or more of—

(i) the combined voting power of all classes of stock entitled to vote or the total value of shares of all classes of stock of a corporation,

(ii) the capital interest or the profits interest of a partnership, or

(iii) the beneficial interest of a trust or unincorporated enterprise,

which is an employer or an employee organization described in subparagraph (C) or (D);

(F) a member of the family (as defined in paragraph (6)) of any individual described in subparagraph (A), (B), (C), or (E);

(G) a corporation, partnership, or trust or estate of which (or in which) 50 percent or more of—

(i) the combined voting power of all classes of stock entitled to vote or the total value of shares of all classes of stock of such corporation,

(ii) the capital interest or profits interest of such partnership, or

(iii) the beneficial interest of such trust or estate, is owned directly or indirectly, or held by persons described in subparagraph (A), (B), (C), (D), or (E);

(H) an officer, director (or an individual having powers or responsibilities similar to those of officers or directors), a 10 percent or more shareholder, or a highly compensated employee (earning 10 percent or more of the yearly wages of an employer) of a person described in subparagraph (C), (D), (E), or (G); or

(I) a 10 percent or more (in capital or profits) partner or joint venturer of a person described in subparagraph (C), (D), (E), or (G).

The Secretary, after consultation and coordination with the Secretary of Labor or his delegate, may by regulation prescribe a percentage lower than 50 percent for subparagraphs (E) and (G) and lower than 10 percent for subparagraphs (H) and (I).

(3) FIDUCIARY.—For purposes of this section, the term "fiduciary" means any person who—

(A) exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets,

(B) renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or

(C) has any discretionary authority or discretionary responsibility in the administration of such plan.

Such term includes any person designated under section 405(c)(1)(B) of the Employee Retirement Income Security Act of 1974.

(4) STOCKHOLDINGS.—For purposes of paragraphs (2)(E)(i) and (G)(i) there shall be taken into account indirect stockholdings which would be taken into account under section 267(c), except that, for purposes of this paragraph, section 267(c)(4) shall be treated as providing that the members of the family of an individual are the members within the meaning of paragraph (6).

(5) PARTNERSHIPS; TRUSTS.—For purposes of paragraphs (2)(E)(ii) and (iii), (G)(ii) and (iii), and (I) the ownership of profits or beneficial interests shall be determined in accordance with the rules for constructive ownership of stock provided in section 267(c) (other than paragraph (3) thereof), except that section 267(c)(4) shall be treated as providing that the members of the family of an individual are the members within the meaning of paragraph (6).

(6) MEMBER OF FAMILY.—For purposes of paragraph (2)(F), the family of any individual shall include his spouse, ancestor, lineal descendant, and any spouse of a lineal descendant.

(7) EMPLOYEE STOCK OWNERSHIP PLAN.—The term "employee stock ownership plan" means a defined contribution plan—

(A) which is a stock bonus plan which is qualified, or a stock bonus and a money purchase plan both of which are qualified under section 401(a), and which are designed to invest primarily in qualifying employer securities; and

(B) which is otherwise defined in regulations prescribed by the Secretary.

A plan shall not be treated as an employee stock ownership plan unless it meets the requirements of section 409(h), section 409(o), and, if applicable, section 409(n), section 409(p), and section 664(g) and, if the employer has a registration-type class of securities (as defined in section 409(e)(4)), it meets the requirements of section 409(e).

(8) QUALIFYING EMPLOYER SECURITY.—The term "qualifying employer security" means any employer security within the meaning of section 409(l). If any moneys or other property of a plan are invested in shares of an investment company reg-

istered under the Investment Company Act of 1940, the investment shall not cause that investment company or that investment company's investment adviser or principal underwriter to be treated as a fiduciary or a disqualified person for purposes of this section, except when an investment company or its investment adviser or principal underwriter acts in connection with a plan covering employees of the investment company, its investment adviser, or its principal underwriter.

(9) SECTION MADE APPLICABLE TO WITHDRAWAL LIABILITY PAYMENT FUNDS.—For purposes of this section—

(A) IN GENERAL.—The term "plan" includes a trust described in section 501(c)(22).

(B) DISQUALIFIED PERSON.—In the case of any trust to which this section applies by reason of subparagraph (A), the term "disqualified person" includes any person who is a disqualified person with respect to any plan to which such trust is permitted to make payments under section 4223 of the Employee Retirement Income Security Act of 1974.

(10) INVESTMENT ADVICE.—

(A) IN GENERAL.—For purposes of this section, the term "investment advice" means a recommendation that—

(i) relates to—

(I) the advisability of acquiring, holding, disposing, or exchanging any moneys or other property of a plan by the plan, plan participants, or plan beneficiaries, including any recommendation whether to take a distribution of benefits from such plan or any recommendation relating to the investment of any moneys or other property of such plan to be distributed from such plan;

(II) the management of moneys or other property of such plan, including recommendations relating to the management of moneys or other property to be distributed from such plan; or

(III) the advisability of retaining or ceasing to retain a person who would receive a fee or other compensation for providing any of the types of advice described in this subclause; and

(ii) is rendered pursuant to—

(I) a written acknowledgment that the person is a fiduciary with respect to the provision of such recommendation; or

(II) a mutual agreement, arrangement, or understanding which may include limitations on scope, timing, and responsibility to provide ongoing monitoring or advice services, between the person making such recommendation and the plan, plan participant, or beneficiary that such recommendation is individualized to the plan, plan participant, or beneficiary and such plan, plan participant, or beneficiary intends to materially rely on such recommendation in making investment or management decisions with respect to any moneys or other property of such plan.

(B) DISCLAIMER OF A MUTUAL AGREEMENT, ARRANGEMENT, OR UNDERSTANDING.—For purposes of subparagraph (A)(ii)(II), any disclaimer of a mutual agreement, arrangement, or understanding shall only state the following: "This information is not individualized to you, and you are not intended to materially rely on this information in making investment or management decisions.". Such disclaimer shall not be effective unless such disclaimer is in writing and is communicated in a clear and prominent manner and an objective person would reasonably conclude that, based on all the facts and circumstances, there was not a mutual agreement, arrangement, or understanding.

(C) WHEN RECOMMENDATION TREATED AS MADE PURSUANT TO A MUTUAL AGREEMENT, ARRANGEMENT, OR UNDERSTANDING.—For purposes of subparagraph (A)(ii)(II), information shall not be treated as a recommendation made pursuant to a mutual agreement, arrangement, or understanding, and such information shall contain the disclaimer required by subparagraph (B), if—

(i) SELLER'S EXCEPTION.—The information is provided in conjunction with full and fair disclosure in writing to a plan, plan participant, or beneficiary that the person providing the information is doing so in its marketing or sales capacity, including any information regarding the terms and conditions of the engagement of the person providing the information, and that the person is not intending to provide investment advice within the meaning of this subparagraph or to otherwise act as a fiduciary to the plan or under the obligations of a best interest recommendation.

(ii) SWAP AND SECURITY-BASED SWAP TRANSACTION.—The person providing the information is a counterparty or service provider to the plan in connection with any transaction based on the information (including a service arrangement, sale, purchase, loan, bilateral contract, swap (as defined in section 1a of the Commodity Exchange Act (7 U.S.C. 1a)), or security-based swap (as defined in section 3(a) of the Securities Exchange Act (15 U.S.C. 78c(a)))), but only if—

(I) the plan is represented, in connection with such transaction, by a plan fiduciary that is independent of the person providing the information, and, except in the case of a swap or security-based swap, independent of the plan sponsor; and

(II) prior to entering into such transaction, the independent plan fiduciary represents in writing to the person providing the information that it is aware that the person has a financial interest in the transaction and that it has determined that the person is not intending to provide investment advice within the meaning of this subparagraph or to otherwise act as a fiduciary to the plan, plan participants, or plan beneficiaries.

(iii) EMPLOYEES OF A PLAN SPONSOR.—The person providing the information is an employee of any spon-

soring employer or employee organization who provides the information to the plan for no fee or other compensation other than the employee's normal compensation.

(iv) PLATFORM PROVIDERS SELECTION AND MONITORING ASSISTANCE.—The person providing the information discloses in writing to the plan fiduciary that the person is not undertaking to provide investment advice as a fiduciary (within the meaning of this paragraph) or under the obligations of a best interest recommendation and the information consists solely of—

(I) making available to the plan, plan participants, or plan beneficiaries, without regard to the individualized needs of the plan, plan participants, or plan beneficiaries, securities or other property through a platform or similar mechanism from which a plan fiduciary may select or monitor investment alternatives, including qualified default investment alternatives, into which plan participants or beneficiaries may direct the investment of assets held in, or contributed to, their individual accounts, or

(II) in connection with a platform or similar mechanism described in subclause (I)—

(aa) identifying investment alternatives that meet objective criteria specified by the plan, such as criteria concerning expense ratios, fund sizes, types of asset, or credit quality, or

(bb) providing objective financial data and comparisons with independent benchmarks to the plan.

(v) VALUATION.—The information consists solely of valuation information.

(vi) FINANCIAL EDUCATION.—The information consists solely of—

(I) information described in Department of Labor Interpretive Bulletin 96–1 (29 C.F.R. 2509.96–1, as in effect on January 1, 2015), regardless of whether such education is provided to a plan or plan fiduciary or a participant or beneficiary,

(II) information provided to participants or beneficiaries regarding the factors to consider in deciding whether to elect to receive a distribution from a plan and whether to roll over such distribution to a plan, so long as any examples of different distribution alternatives are accompanied by all material facts and assumptions on which the examples are based, or

(III) any additional information treated as education by the Secretary.

(11) BEST INTEREST RECOMMENDATION.—For purposes of this subsection—

(A) IN GENERAL.—The term "best interest recommendation" means a recommendation—

(i) for which no more than reasonable compensation is paid (as determined under subsection (d)(2)),

(ii) provided by a person acting with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person would exercise based on—

(I) the information obtained through the reasonable diligence of the person regarding factors such as the advice recipient's age, and

(II) any other information that the advice recipient discloses to the person in connection with receiving such recommendation, and

(iii) where the person places the interests of the plan or advice recipient above its own.

(B) INVESTMENT OPTIONS; VARIABLE COMPENSATION.—A best interest recommendation may include a recommendation that—

(i) is based on a limited range of investment options (which may consist, in whole or in part, of proprietary products), but only if any such limitations shall be clearly disclosed to the advice recipient prior to any transaction based on the investment advice in the form of a notice that only states the following: "This recommendation is based on a limited range of investment options, and the same or similar investments may be available at a different cost (greater or lesser) from other sources.", or

(ii) may result in variable compensation to the person providing the recommendation (or any affiliate of such person), but only if the receipt of such compensation shall be clearly disclosed to the advice recipient prior to any transaction based on the investment advice.

(C) CLEAR DISCLOSURE OF VARIABLE COMPENSATION.—For purposes of this paragraph, clear disclosure of variable compensation shall include, in a manner calculated to be understood by the average individual, each of the following:

(i) A notice that states only the following: "This recommendation may result in varying amounts of fees or other compensation to the person providing the recommendation (or its affiliate), and the same or similar investments may be available at a different cost (greater or lesser) from other sources.". Any regulations or administrative guidance implementing this clause may not require this notice to be updated more than annually.

(ii) A description of any fee or other compensation that is directly or indirectly payable to the person (or its affiliate) by the advice recipient with respect to such transaction (expressed as an amount, formula, percentage of assets, per capita charge, or estimate or range of such compensation).

(iii) A description of the types and ranges of any compensation that may be directly or indirectly payable to the person (or its affiliate) by any third party in con-

nection with such transaction (expressed as an amount, formula, percentage of assets, per capita charge, or estimate or range of such compensation).

(iv) Upon request of the advice recipient, a disclosure of the specific amounts of compensation described in clause (iii) that the person will receive in connection with the particular transaction (expressed as an amount, formula, percentage of assets, per capita charge, or estimate of such compensation).

(D) DEFINITION OF AFFILIATE.—For purposes of this paragraph, the term "affiliate" has the meaning given in subsection (f)(8)(J)(ii).

(E) CORRECTION OF CERTAIN ERRORS AND OMISSIONS.—A recommendation shall not fail to be a best interest recommendation solely because a person who, acting in good faith and with reasonable diligence, makes an error or omission in disclosing the information specified in subparagraph (B), if the person discloses the correct information to the advice recipient as soon as practicable but not later than 30 days from the date on which the person knows of such error or omission.

(F) SPECIAL RULE.—Any notice provided pursuant to a requirement under subparagraph (B)(i) or subparagraph (C)(i) shall have no effect on any other notice otherwise required without regard to this title, and shall be provided in addition to, and not in lieu of, any other such notice.

(f) OTHER DEFINITIONS AND SPECIAL RULES.—For purposes of this section—

(1) JOINT AND SEVERAL LIABILITY.—If more than one person is liable under subsection (a) or (b) with respect to any one prohibited transaction, all such persons shall be jointly and severally liable under such subsection with respect to such transaction.

(2) TAXABLE PERIOD.—The term "taxable period" means, with respect to any prohibited transaction, the period beginning with the date on which the prohibited transaction occurs and ending on the earliest of—

(A) the date of mailing a notice of deficiency with respect to the tax imposed by subsection (a) under section 6212,

(B) the date on which the tax imposed by subsection (a) is assessed, or

(C) the date on which correction of the prohibited transaction is completed.

(3) SALE OR EXCHANGE; ENCUMBERED PROPERTY.—A transfer or real or personal property by a disqualified person to a plan shall be treated as a sale or exchange if the property is subject to a mortgage or similar lien which the plan assumes or if it is subject to a mortgage or similar lien which a disqualified person placed on the property within the 10-year period ending on the date of the transfer.

(4) AMOUNT INVOLVED.—The term "amount involved" means, with respect to a prohibited transaction, the greater of the amount of money and the fair market value of the other property given or the amount of money and the fair market value of the other property received; except that, in the case of serv-

ices described in paragraphs (2) and (10) of subsection (d) the amount involved shall be only the [excess compensation.] *excess compensation, and in the case of a prohibited transaction arising by the failure of investment advice to be a best interest recommendation, the amount involved shall be the amount paid to the person providing the advice (or its affiliate, as defined in paragraph (8)(J)(ii)) that has not been paid or reimbursed to the plan, plan participants, or plan beneficiaries, including payments and reimbursements made pursuant to paragraph (5).* For purposes of the preceding sentence, the fair market value—

(A) in the case of the tax imposed by subsection (a), shall be determined as of the date on which the prohibited transaction occurs; and

(B) in the case of the tax imposed by subsection (b), shall be the highest fair market value during the taxable period.

[(5) CORRECTION.—The terms]

(5) CORRECTION.—

(A) IN GENERAL.—Except as provided in subparagraph (B), the terms "correction" and "correct" mean, with respect to a prohibited transaction, undoing the transaction to the extent possible, but in any case placing the plan in a financial position not worse than that in which it would be if the disqualified person were acting under the highest fiduciary standards.

(B) DETERMINATION OF "CORRECTION" AND "CORRECT" WITH RESPECT TO BEST INTEREST ADVICE RECOMMENDATIONS.—In the case of a prohibited transaction arising by the failure of investment advice to be a best interest recommendation, the terms "correction" and "correct" mean the payment to, or reimbursement of, actual damages of the plan, plan participants, or plan beneficiaries resulting directly from the plan's, plan participant's, or plan beneficiary's reliance on such investment advice, if any, that have not otherwise been paid or reimbursed to the plan, plan participants, or plan beneficiaries, including payments and reimbursements made pursuant to subparagraph (A) if such amount is greater than the amount determined under subparagraph (A).

(6) EXEMPTIONS NOT TO APPLY TO CERTAIN TRANSACTIONS.—

(A) IN GENERAL.—In the case of a trust described in section 401(a) which is part of a plan providing contributions or benefits for employees some or all of whom are owner-employees (as defined in section 401(c)(3)), the exemptions provided by subsection (d) (other than paragraphs (9) and (12)) shall not apply to a transaction in which the plan directly or indirectly—

(i) lends any part of the corpus or income of the plan to,

(ii) pays any compensation for personal services rendered to the plan to, or

(iii) acquires for the plan any property from, or sells any property to,

any such owner-employee, a member of the family (as defined in section 267(c)(4)) of any such owner-employee, or

any corporation in which any such owner-employee owns, directly or indirectly, 50 percent or more of the total combined voting power of all classes of stock entitled to vote or 50 percent or more of the total value of shares of all classes of stock of the corporation.

(B) Special rules for shareholder-employees, etc.

(i) IN GENERAL.—For purposes of subparagraph (A), the following shall be treated as owner-employees:

(I) A shareholder-employee.

(II) A participant or beneficiary of an individual retirement plan (as defined in section 7701(a)(37)).

(III) An employer or association of employees which establishes such an individual retirement plan under section 408(c).

(ii) EXCEPTION FOR CERTAIN TRANSACTIONS INVOLVING SHAREHOLDER-EMPLOYEES.—Subparagraph (A)(iii) shall not apply to a transaction which consists of a sale of employer securities to an employee stock ownership plan (as defined in subsection (e)(7)) by a shareholder- employee, a member of the family (as defined in section 267(c)(4)) of such shareholder-employee, or a corporation in which such a shareholder-employee owns stock representing a 50 percent or greater interest described in subparagraph (A).

(iii) LOAN EXCEPTION.—For purposes of subparagraph (A)(i), the term "owner-employee" shall only include a person described in subclause (II) or (III) of clause (i).

(C) SHAREHOLDER-EMPLOYEE.—For purposes of subparagraph (B), the term "shareholder-employee" means an employee or officer of an S corporation who owns (or is considered as owning within the meaning of section 318(a)(1)) more than 5 percent of the outstanding stock of the corporation on any day during the taxable year of such corporation.

(7) S CORPORATION REPAYMENT OF LOANS FOR QUALIFYING EMPLOYER SECURITIES.—A plan shall not be treated as violating the requirements of section 401 or 409 or subsection (e)(7), or as engaging in a prohibited transaction for purposes of subsection (d)(3), merely by reason of any distribution (as described in section 1368(a)) with respect to S corporation stock that constitutes qualifying employer securities, which in accordance with the plan provisions is used to make payments on a loan described in subsection (d)(3) the proceeds of which were used to acquire such qualifying employer securities (whether or not allocated to participants). The preceding sentence shall not apply in the case of a distribution which is paid with respect to any employer security which is allocated to a participant unless the plan provides that employer securities with a fair market value of not less than the amount of such distribution are allocated to such participant for the year which (but for the preceding sentence) such distribution would have been allocated to such participant.

(8) PROVISION OF INVESTMENT ADVICE TO PARTICIPANT AND BENEFICIARIES.—

(A) IN GENERAL.—The prohibitions provided in subsection (c) shall not apply to transactions described in subsection (d)(17) if the investment advice provided by a fiduciary adviser is provided under an eligible investment advice arrangement.

(B) ELIGIBLE INVESTMENT ADVICE ARRANGEMENT.—For purposes of this paragraph, the term "eligible investment advice arrangement" means an arrangement—

(i) which either—

(I) provides that any fees (including any commission or other compensation) received by the fiduciary adviser for investment advice or with respect to the sale, holding, or acquisition of any security or other property for purposes of investment of plan assets do not vary depending on the basis of any investment option selected, or

(II) uses a computer model under an investment advice program meeting the requirements of subparagraph (C) in connection with the provision of investment advice by a fiduciary adviser to a participant or beneficiary, and

(ii) with respect to which the requirements of subparagraphs (D), (E), (F), (G), (H), and (I) are met.

(C) INVESTMENT ADVICE PROGRAM USING COMPUTER MODEL.—

(i) IN GENERAL.—An investment advice program meets the requirements of this subparagraph if the requirements of clauses (ii), (iii), and (iv) are met.

(ii) COMPUTER MODEL.—The requirements of this clause are met if the investment advice provided under the investment advice program is provided pursuant to a computer model that—

(I) applies generally accepted investment theories that take into account the historic returns of different asset classes over defined periods of time,

(II) utilizes relevant information about the participant, which may include age, life expectancy, retirement age, risk tolerance, other assets or sources of income, and preferences as to certain types of investments,

(III) utilizes prescribed objective criteria to provide asset allocation portfolios comprised of investment options available under the plan,

(IV) operates in a manner that is not biased in favor of investments offered by the fiduciary adviser or a person with a material affiliation or contractual relationship with the fiduciary adviser, and

(V) takes into account all investment options under the plan in specifying how a participant's account balance should be invested and is not inappropriately weighted with respect to any investment option.

(iii) CERTIFICATION.—

(I) IN GENERAL.—The requirements of this clause are met with respect to any investment advice program if an eligible investment expert certifies, prior to the utilization of the computer model and in accordance with rules prescribed by the Secretary of Labor, that the computer model meets the requirements of clause (ii).

(II) RENEWAL OF CERTIFICATIONS.—If, as determined under regulations prescribed by the Secretary of Labor, there are material modifications to a computer model, the requirements of this clause are met only if a certification described in subclause (I) is obtained with respect to the computer model as so modified.

(III) ELIGIBLE INVESTMENT EXPERT.—The term "eligible investment expert" means any person which meets such requirements as the Secretary of Labor may provide and which does not bear any material affiliation or contractual relationship with any investment adviser or a related person thereof (or any employee, agent, or registered representative of the investment adviser or related person).

(iv) EXCLUSIVITY OF RECOMMENDATION.—The requirements of this clause are met with respect to any investment advice program if—

(I) the only investment advice provided under the program is the advice generated by the computer model described in clause (ii), and

(II) any transaction described in subsection (d)(17)(A)(ii) occurs solely at the direction of the participant or beneficiary.

Nothing in the preceding sentence shall preclude the participant or beneficiary from requesting investment advice other than that described in clause (i), but only if such request has not been solicited by any person connected with carrying out the arrangement.

(D) EXPRESS AUTHORIZATION BY SEPARATE FIDUCIARY.—The requirements of this subparagraph are met with respect to an arrangement if the arrangement is expressly authorized by a plan fiduciary other than the person offering the investment advice program, any person providing investment options under the plan, or any affiliate of either.

(E) AUDITS.—

(i) IN GENERAL.—The requirements of this subparagraph are met if an independent auditor, who has appropriate technical training or experience and proficiency and so represents in writing—

(I) conducts an annual audit of the arrangement for compliance with the requirements of this paragraph, and

(II) following completion of the annual audit, issues a written report to the fiduciary who authorized use of the arrangement which presents

its specific findings regarding compliance of the arrangement with the requirements of this paragraph.

(ii) SPECIAL RULE FOR INDIVIDUAL RETIREMENT AND SIMILAR PLANS.—In the case of a plan described in subparagraphs (B) through (F) (and so much of subparagraph (G) as relates to such subparagraphs) of subsection (e)(1), in lieu of the requirements of clause (i), audits of the arrangement shall be conducted at such times and in such manner as the Secretary of Labor may prescribe.

(iii) INDEPENDENT AUDITOR.—For purposes of this subparagraph, an auditor is considered independent if it is not related to the person offering the arrangement to the plan and is not related to any person providing investment options under the plan.

(F) DISCLOSURE.—The requirements of this subparagraph are met if—

(i) the fiduciary adviser provides to a participant or a beneficiary before the initial provision of the investment advice with regard to any security or other property offered as an investment option, a written notification (which may consist of notification by means of electronic communication)—

(I) of the role of any party that has a material affiliation or contractual relationship with the fiduciary adviser, in the development of the investment advice program and in the selection of investment options available under the plan,

(II) of the past performance and historical rates of return of the investment options available under the plan,

(III) of all fees or other compensation relating to the advice that the fiduciary adviser or any affiliate thereof is to receive (including compensation provided by any third party) in connection with the provision of the advice or in connection with the sale, acquisition, or holding of the security or other property,

(IV) of any material affiliation or contractual relationship of the fiduciary adviser or affiliates thereof in the security or other property,

(V) the manner, and under what circumstances, any participant or beneficiary information provided under the arrangement will be used or disclosed,

(VI) of the types of services provided by the fiduciary adviser in connection with the provision of investment advice by the fiduciary adviser,

(VII) that the adviser is acting as a fiduciary of the plan in connection with the provision of the advice, and

(VIII) that a recipient of the advice may separately arrange for the provision of advice by another adviser, that could have no material affili-

ation with and receive no fees or other compensation in connection with the security or other property, and

(ii) at all times during the provision of advisory services to the participant or beneficiary, the fiduciary adviser—

(I) maintains the information described in clause (i) in accurate form and in the manner described in subparagraph (H),

(II) provides, without charge, accurate information to the recipient of the advice no less frequently than annually,

(III) provides, without charge, accurate information to the recipient of the advice upon request of the recipient, and

(IV) provides, without charge, accurate information to the recipient of the advice concerning any material change to the information required to be provided to the recipient of the advice at a time reasonably contemporaneous to the change in information.

(G) OTHER CONDITIONS.—The requirements of this subparagraph are met if—

(i) the fiduciary adviser provides appropriate disclosure, in connection with the sale, acquisition, or holding of the security or other property, in accordance with all applicable securities laws,

(ii) the sale, acquisition, or holding occurs solely at the direction of the recipient of the advice,

(iii) the compensation received by the fiduciary adviser and affiliates thereof in connection with the sale, acquisition, or holding of the security or other property is reasonable, and

(iv) the terms of the sale, acquisition, or holding of the security or other property are at least as favorable to the plan as an arm's length transaction would be.

(H) STANDARDS FOR PRESENTATION OF INFORMATION.—

(i) IN GENERAL.—The requirements of this subparagraph are met if the notification required to be provided to participants and beneficiaries under subparagraph (F)(i) is written in a clear and conspicuous manner and in a manner calculated to be understood by the average plan participant and is sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of the information required to be provided in the notification.

(ii) MODEL FORM FOR DISCLOSURE OF FEES AND OTHER COMPENSATION.—The Secretary of Labor shall issue a model form for the disclosure of fees and other compensation required in subparagraph (F)(i)(III) which meets the requirements of clause (i).

(I) MAINTENANCE FOR 6 YEARS OF EVIDENCE OF COMPLIANCE.—The requirements of this subparagraph are met if a fiduciary adviser who has provided advice referred to in subparagraph (A) maintains, for a period of not less than

6 years after the provision of the advice, any records necessary for determining whether the requirements of the preceding provisions of this paragraph and of subsection (d)(17) have been met. A transaction prohibited under subsection (c) shall not be considered to have occurred solely because the records are lost or destroyed prior to the end of the 6-year period due to circumstances beyond the control of the fiduciary adviser.

(J) DEFINITIONS.—For purposes of this paragraph and subsection (d)(17)—

(i) FIDUCIARY ADVISER.—The term "fiduciary adviser" means, with respect to a plan, a person who is a fiduciary of the plan by reason of the provision of investment advice referred to in subsection (e)(3)(B) by the person to a participant or beneficiary of the plan and who is—

(I) registered as an investment adviser under the Investment Advisers Act of 1940 (15 U.S.C. 80b-1 et seq.) or under the laws of the State in which the fiduciary maintains its principal office and place of business,

(II) a bank or similar financial institution referred to in subsection (d)(4) or a savings association (as defined in section 3(b)(1) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(1)), but only if the advice is provided through a trust department of the bank or similar financial institution or savings association which is subject to periodic examination and review by Federal or State banking authorities,

(III) an insurance company qualified to do business under the laws of a State,

(IV) a person registered as a broker or dealer under the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.),

(V) an affiliate of a person described in any of subclauses (I) through (IV), or

(VI) an employee, agent, or registered representative of a person described in subclauses (I) through (V) who satisfies the requirements of applicable insurance, banking, and securities laws relating to the provision of the advice.

For purposes of this title, a person who develops the computer model described in subparagraph (C)(ii) or markets the investment advice program or computer model shall be treated as a person who is a fiduciary of the plan by reason of the provision of investment advice referred to in subsection (e)(3)(B) to a participant or beneficiary and shall be treated as a fiduciary adviser for purposes of this paragraph and subsection (d)(17), except that the Secretary of Labor may prescribe rules under which only 1 fiduciary adviser may elect to be treated as a fiduciary with respect to the plan.

(ii) AFFILIATE.—The term "affiliate" of another entity means an affiliated person of the entity (as defined in section 2(a)(3) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(a)(3))).

(iii) REGISTERED REPRESENTATIVE.—The term "registered representative" of another entity means a person described in section 3(a)(18) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(18)) (substituting the entity for the broker or dealer referred to in such section) or a person described in section 202(a)(17) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-2(a)(17)) (substituting the entity for the investment adviser referred to in such section).

(9) BLOCK TRADE.—The term "block trade" means any trade of at least 10,000 shares or with a market value of at least $200,000 which will be allocated across two or more unrelated client accounts of a fiduciary.

(10) ADEQUATE CONSIDERATION.—The term "adequate consideration" means—

(A) in the case of a security for which there is a generally recognized market—

(i) the price of the security prevailing on a national securities exchange which is registered under section 6 of the Securities Exchange Act of 1934, taking into account factors such as the size of the transaction and marketability of the security, or

(ii) if the security is not traded on such a national securities exchange, a price not less favorable to the plan than the offering price for the security as established by the current bid and asked prices quoted by persons independent of the issuer and of the party in interest, taking into account factors such as the size of the transaction and marketability of the security, and

(B) in the case of an asset other than a security for which there is a generally recognized market, the fair market value of the asset as determined in good faith by a fiduciary or fiduciaries in accordance with regulations prescribed by the Secretary of Labor.

(11) CORRECTION PERIOD.—

(A) IN GENERAL.—For purposes of subsection (d)(23), the term "correction period" means the 14-day period beginning on the date on which the disqualified person discovers, or reasonably should have discovered, that the transaction would (without regard to this paragraph and subsection (d)(23)) constitute a prohibited transaction.

(B) EXCEPTIONS.—

(i) EMPLOYER SECURITIES.—Subsection (d)(23) does not apply to any transaction between a plan and a plan sponsor or its affiliates that involves the acquisition or sale of an employer security (as defined in section 407(d)(1) of the Employee Retirement Income Security Act of 1974) or the acquisition, sale, or lease of employer real property (as defined in section 407(d)(2) of such Act).

(ii) KNOWING PROHIBITED TRANSACTION.—In the case of any disqualified person, subsection (d)(23) does not apply to a transaction if, at the time the transaction is entered into, the disqualified person knew (or reasonably should have known) that the transaction would (without regard to this paragraph) constitute a prohibited transaction.

(C) ABATEMENT OF TAX WHERE THERE IS A CORRECTION.—If a transaction is not treated as a prohibited transaction by reason of subsection (d)(23), then no tax under subsections (a) and (b) shall be assessed with respect to such transaction, and if assessed the assessment shall be abated, and if collected shall be credited or refunded as an overpayment.

(D) DEFINITIONS.—For purposes of this paragraph and subsection (d)(23)—

(i) SECURITY.—The term "security" has the meaning given such term by section 475(c)(2) (without regard to subparagraph (F)(iii) and the last sentence thereof).

(ii) COMMODITY.—The term "commodity" has the meaning given such term by section 475(e)(2) (without regard to subparagraph (D)(iii) thereof).

(iii) CORRECT.—The term "correct" means, with respect to a transaction—

(I) to undo the transaction to the extent possible and in any case to make good to the plan or affected account any losses resulting from the transaction, and

(II) to restore to the plan or affected account any profits made through the use of assets of the plan.

(g) APPLICATION OF SECTION.—This section shall not apply—

(1) in the case of a plan to which a guaranteed benefit policy (as defined in section 401(b)(2)(B) of the Employee Retirement Income Security Act of 1974) is issued, to any assets of the insurance company, insurance service, or insurance organization merely because of its issuance of such policy;

(2) to a governmental plan (within the meaning of section 414(d)); or

(3) to a church plan (within the meaning of section 414(e)) with respect to which the election provided by section 410(d) has not been made.

In the case of a plan which invests in any security issued by an investment company registered under the Investment Company Act of 1940, the assets of such plan shall be deemed to include such security but shall not, by reason of such investment, be deemed to include any assets of such company.

(h) NOTIFICATION OF SECRETARY OF LABOR.—Before sending a notice of deficiency with respect to the tax imposed by subsection (a) or (b), the Secretary shall notify the Secretary of Labor and provide him a reasonable opportunity to obtain a correction of the prohibited transaction or to comment on the imposition of such tax.

(i) CROSS REFERENCE.—For provisions concerning coordination procedures between Secretary of Labor and Secretary of the Treasury with respect to application of tax imposed by this section and

for authority to waive imposition of the tax imposed by subsection (b), see section 3003 of the Employee Retirement Income Security Act of 1974.

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VII. DISSENTING VIEWS

The majority should not have held this markup at this time. This bill is an attempted end-run around the executive branch rule-making process.

What this bill would do is amend the statutory rules that determine when investment advice given by an advisor to an IRA owner, retirement plan sponsor, or retirement plan participant gives rise to fiduciary status.

This issue is an important one. Plan participants and IRA owners are often not experienced investors. They rely on advice that is given to them by investment professionals. Ensuring that this advice is impartial and free from conflicts of interest is critical.

The Administration first issued proposed regulations on this issue six years ago in 2010. They received many comments from consumer and industry groups and decided to redraft the proposal. That new proposal—issued last year—prompted more than 3,000 individual comment letters, and was the subject of petitions that generated hundreds of thousands of signatures. The Administration has stated that it has taken these comments and the numerous consultations on all sides of this issue into account when they prepared a final draft of the rule, which is now being considered by the Office of Management and the Budget.

This markup should not have been held until the final rule is issued, and Congress and consumer and industry groups have had adequate time to review it.

This bill also sets a harmful precedent. It is a precedent that Republicans want as part of their effort to pass the REINS Act (H.R. 427), a bill that passed the House last summer on a largely party line vote that would effectively bring executive branch rule-making to a standstill by requiring an affirmative "yes" vote from both chambers of Congress before a final rule may become effective. H.R. 4294 includes a similar requirement for the soon-to-be-released final rule.

SANDY LEVIN,
Ranking Member,
Committee on Ways and Means.